

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

**BEFORE SH. SUBHASH MALGURIA, JUDICIAL MEMBER
AND
SH. NIKHIL CHOUDHARY, ACCOUNTANT MEMBER**

ITA No.154/ALLD/2024
A.Y. 2015-16

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|-----------------------------------------------|-----|-----------------------------------------------------------|
| Arup Banerji, 14/18, Elgin Road, Allahabad | vs. | Deputy Commissioner of Income Tax, Circle-1, Allahabad |
| PAN:ACUPB7330A | | |
| (Appellant) | | (Respondent) |

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|------------------------|------------------------|
| Assessee by: | Sh. S.K. Jaiswal, C.A. |
| Revenue by: | Sh. A.K. Singh, Sr. DR |
| Date of hearing: | 05.06.2025 |
| Date of pronouncement: | 31.07.2025 |

ORDER

PER NIKHIL CHOUDHARY, A.M.:

This is an appeal filed by the assessee against the order of the Id. CIT(A)-3, Lucknow under section 250 of the Income Tax Act, 1961 wherein the Id. CIT(A) has dismissed the appeal of the assessee against the order of the Id. AO, passed under section 143(3) of the Income Tax Act, 1961 on 30.12.2017. The grounds of appeal are as under:-

“1. BECAUSE the learned Commissioner of Income Tax (Appeals) has erred in law and on facts in sustaining disallowance of set-off of loss from 'Derivative Trading ' of Rs. 1,57,21,804/- against the normal income from business and professional on the ground that appellant has not submitted any of the contract notes of the broker and sub-broker.

2. BECAUSE during the course of assessment proceeding appellant has furnished the Derivative Trading Account and produced the books of account together with all supporting vouchers and contract notes.

3. BECAUSE the learned Commissioner of Income Tax (Appeals) has failed to appreciate the fact that this issue is already decided by the Hon'ble ITAT in the case of appellant in the A.Y. 2012-13 and 2013-14.

4. BECAUSE as per the definition of 'speculative transaction' given in sub-section 5 of section 43, transaction in respect of 'Derivative Trading ' is specifically excluded from the definition of 'speculative transaction'.

5. BECAUSE the appellant denies for levy of interest under section 234B and 234C of the Income Tax Act, 1961.

6. BECAUSE the order appealed against is contrary to the facts, law and principle of natural justice."

2. The facts of the case are that, the assessee is a Doctor who also indulges in Derivative Trading. During the assessment year in question, the assessee claimed a derivative loss of Rs.1,57,21,804/- and sought to set off the same against the business profit from medical profession. In justification of his claim, the assessee submitted that the results of derivative trading were verifiable from the broker's statement and the audited statement of profit and loss. The ld. AO noted, that as per the provisions of section 43(5), a few conditions should be fulfilled before derivative transactions could be claimed as business transactions. However, the assessee had not submitted any of the contract notes of the broker or the sub broker, as required under explanation 1 and 2 to section 43(5) of the Income Tax Act, 1961. Therefore, he decided to treat the loss from derivative transactions as a speculative loss and refused to allow it to be adjusted against the business income of the assessee.

3. The assessee is aggrieved at this denial of set off and accordingly filed an appeal in the matter before the ld. CIT(A). Before the ld. CIT(A), it was submitted that the ld. AO had failed to appreciate that as per the definition of speculative transactions given in section 43(5), Derivative Trading was specifically excluded from the definition of, "speculative transaction". As far as contract notes were concerned, the assessee submitted that during the course of assessment proceedings, the assessee had furnished the audited statement of derivative trading account and also produced the books of accounts alongwith all supporting bills, vouchers and contract notes. He further submitted that after the survey proceedings carried out at his place, all the

contract notes and broker statement had been furnished by the assessee as well as the brokers in compliance to the notice issued under section 133(6) seeking the copy of the contract notes and the brokers statement of account. The assessee also submitted that in the previous assessment years, the dispute of setting off of loss from derivative trading against normal business income had come up for consideration and in those assessment years, the Id. CIT(A) had decided the issue in favour of the assessee. Furthermore, the matter had been carried to the ITAT, Allahabad Bench and in ITA No.163/ALLD/2017 for the A.Y. 2012-13, the Hon'ble Allahabad Bench had held that since the assessee had filed certificates from three recognized stock brokers namely Nirmal Bank Securities, Motilal Oswal Securities and Kotak Securities who had carried out the transactions on behalf of the assessee, the disallowance of set off of loss from derivative trading against the normal business income was unjustified and the set off was deserving of being allowed. The Id. CIT(A) considered the aforesaid precedents and the provisions of section 43(5) to point out that derivative trading was specifically excluded from the definition of, "speculative transaction" when the transaction was carried out electronically, on screen based systems through stock broker or a sub broker, in accordance with the provisions of the security contracts (Regulation) Act, 1956 or the SEBI Act, 1992 or the Depositories Act, 1996 on a recognized stock exchange and was supported by time stamped contract note. However, the Id. CIT(A) noted that in the present assessment year, the assessee had not submitted the time stamped contract notes before the Id. AO. He also noted that in the appeal for the assessment years 2012-13 and 2013-14, the ITAT Allahabad Bench had accepted the plea of the assessee that the income from derivatives was not a speculative transaction on account of the certificates from three recognized stock brokers who had carried out the transactions on behalf of the assessee. However, in the present assessment year, no such certificate has been filed either before the Id. AO or during the appeal proceedings. In view of the same, since the assessee had not been able to establish that the trades had been carried out through time stamped contract notes, the claim of the

assessee for set off was fit to be disallowed. Accordingly, the ld. CIT(A) dismissed the appeal of the assessee.

4. Aggrieved with the dismissal of his appeal, the assessee has now come before us. Sh. Shiv Kumar Jaiswal, C.A. (hereinafter referred to as the 'ld. AR') submitted that the issue of whether the assessee could set off derivative loss against normal business losses was covered by the order of the ITAT for the assessment years 2012-13 and 2013-14. The ld. AR also pointed out that in the assessment for the assessment year 2016-17, the ld. AO had himself accepted the fact that the income / loss from derivatives was regular business income and accordingly the returned income of the assessee had been accepted. The ld. AR, though accepting that he had not furnished copies of the contract notes during the course of assessment, submitted that copies of the contract notes had been given in soft copies during the survey. However, he submitted that neither had the ld. AO nor the ld. CIT(A) had asked him to produce copy of the contract notes during proceedings before them. The ld. AR further pointed out that the case was a case of limited scrutiny and one of the points on which it had been picked up for limited scrutiny was the issue of derivatives (futures) transaction but the ld. AO had asked the assessee to submit the entire details of loss of Rs.1,54,14,412/-, which was beyond his scope. The ld. AR submitted that he had submitted before the ld. AO, a copy of the audited derivative trading account and also submitted statements from the brokers before the ld. AO. He drew reference to his written submission dated 10.08.2017 and specifically referred to para 10 of the said statements, wherein it had been stated that he was submitting a statement of accounts of investments made in SIPs and mutual funds and also including the statement of accounts of the three brokers namely Nirmal Bang Securities Pvt. Ltd., Motilal Oswal Securities Ltd., and Kotak Securities Ltd., He also drew reference to para 11 where it was mentioned that he was submitting a copy of the demat account of these three brokers and the profit and loss statements of M/s Nirmal Bang Securities Pvt. Ltd., Motilal Oswal Securities

Ltd., and Kotak Securities Ltd., which contained the scrip wise details of purchase and sale of shares (derivatives) made during the year under consideration. He further pointed out that there was no murmuring in the assessment order that he had not furnished these details and the Id. CIT(A) had derived a wrong presumption regarding the non-filing of brokers statements. It was further submitted that the Department had called for information from all three brokers under section 133(6) of the Income Tax Act, 1961 and therefore, all these details stood furnished before the Department. However, despite these, the assessee had not been allowed the benefit of set off, when there was no doubt about the fact that the loss from derivatives was in the nature of regular business loss.

5. On the other hand, Sh. A.K. Singh, Sr. DR (hereinafter referred to as the 'Id. Sr. DR') questioned the authenticity of the submission made before the Id. AO, particularly paragraphs 10 and 11. It was submitted that the assessee did not submit any material during the assessment proceedings. In fact, it was submitted that in the computation of income, the nature of business had not been mentioned and the loss had been claimed under other income. The Id. Sr. DR invited our attention to pages 35 and 36 of his paper book which contained the balance-sheet and the profit and loss account for Heartline Cardiac Care Centre, Allahabad and submitted that the income / loss from derivatives was not shown in the audited profit and loss account. The Id. Sr. DR further pointed out that this was not a case of limited scrutiny, because of the fact of survey being conducted upon the assessee and therefore, besides the selection of the case for limited scrutiny under the CASS, the AO had simultaneously issued a notice under section 143(2) informing the assessee that the case had been selected for full scrutiny due to this survey. The Id. Sr. DR also invited our attention to the notice under section 142(1) dated 8.06.2017, wherein in point no. 25, the Id. AO had specifically requested the assessee to submit complete details of the loss of Rs.1,54,14,412/- under the head, 'other income'. However, it was submitted that the assessee did not make compliance

and in fact insisted that his case had been selected for limited scrutiny as evidenced by his reply dated 21.06.2017. Thereafter, he had to be informed that vide CBDT Instruction No.4/2016 dated 13.07.2016, point 1(ii), since a survey had been conducted at his premises under section 133A on 17.12.2014, therefore, his case was a case that was to be taken up for complete scrutiny. Despite this, the ld. Sr. DR pointed out that the assessee did not submit a copy of the demat account or the copy of the brokers' statement before the ld. AO. With regard to the assessee's claim that he had submitted the hard disk during the course of survey which contained copies of the digital contract notes, the ld. Sr. DR submitted that the assessee had not produced any evidence before any authority that the said hard disk contained the digital copies of the contract notes and he pointed out that in any case, the survey had happened in the middle of the financial year i.e. 17.12.2014 and therefore, it was clear that the said hard disk could not contain the time stamped contract notes for the period beyond that and up till 31.03.2015. The ld. Sr. DR further invited our attention to page 58A of his paper book to show that vide his notice under section 142(1) dated 11.12.2017, the ld. AO had pointed out that despite him saying that he did the business of derivative trading, there was no reflection of the same in the income tax returns filed by the assessee and the assessee had been asked to reply to the same. In response, the assessee had filed a reply to the same, in which the only annexure was a single page derivative account. He submitted that the assessee was seeking the set off of loss from derivative trading on the basis of audited profit and loss account but he had in fact violated the provisions of section 44AB / Rule 12(2), by not furnishing the audit report in respect of derivative transactions electronically alongwith the audited financials of his medical profession. Moreover, he had taken it to other income. The ld. Sr. DR further pointed out that section 143(2) allowed the assessee to support the return that had been filed with relevant evidences and the assessee had not filed any response to the 143(2), whereby these evidences could have been brought on record. The ld. DR took our attention to the provisions of section 43(5) holding that the said was a deeming provision for

speculative transactions and submitted that the transactions in derivative could be held to be business transactions other than speculative transactions only if the conditions laid down in the Explanations were fulfilled. These were that the trading had to be done on a screen, through a recognized broker, on a recognized stock exchange and supported by time stamped contract notes. Therefore, to avail the benefits of classification, the assessee had to adhere to all the conditions of the Explanations 1& 2 of section 43(5). He pointed out that the principle of estoppel and res judicata did not apply to income tax proceedings. Merely, because in a previous year, the Tribunal had held that the assessee was entitled to set off his derivative loss against his other business income, could not be a ground to claim the right to do so in this year without submitting the desired details before the Id. AO, to establish that the claim was bona fide for this year also. It was submitted that the audit report of the derivative transactions or the derivative account, was in itself, not sufficient evidence to allow the benefits of set off to the assessee. The conditions had to be fulfilled. The Id. Sr. DR further drew our attention to the fact that the assessee had not asked for time during the assessment proceedings to submit the details holding the same to be voluminous. Therefore, this was not a case of lack of opportunity. He drew our attention to the judgment of the Punjab & Haryana High Court in the case of SAS Educational Society 319 ITR 65 (P&H) to point out that in such case the Hon'ble High Court had held that before restoring a matter back to the Id. AO, the Tribunal must be satisfied that there was a denial of opportunity to the assessee necessitating the restoration of the matter and submitted that no such situation existed here. Therefore, the addition should be sustained. He further drew reference to a previous judgment of the ITAT Allahabad Bench in ITA No.46/ALLD/2025, wherein before restoring a matter back to the Id. AO, the Tribunal had duly taken note of the non-compliance of assessee during assessment proceedings and imposed a token cost upon the assessee and prayed that if the Tribunal did decide to restore the matter back to the file of the Id. AO, it should not be without imposition of costs.

6. In response to the arguments presented by the Id. Sr. DR, the Id. AR invited our attention to page 60 of his paper book where he had explained why the income / loss from derivatives was not shown under the head business. It was submitted that since the main occupation of the assessee was providing medical services therefore, he had not specifically mentioned the details of derivative trading separately in the income tax return filed as the profit and loss in the business of derivative trading was recorded in his capital account with M/s Heartline Cardiac Care Centre. However, the profit and loss from derivative trading was separately shown in the statement showing computation of total income and in the audited statement of account. Therefore, it was submitted that there was no violation on the part of the assessee. Furthermore, it was submitted that the derivative trading account had been separately audited and the net loss had been transferred to the capital account. Therefore, it stood included in the figures reflected in the income tax return. The Id. AR also submitted that there was no option before him to file multiple audit reports and therefore, the annexures were not uploaded. In the circumstances, he prayed that no adverse inference should be taken on account of these technical issues but the overall picture should be seen where the assessee was trading in derivatives in exactly the same manner as he had been trading in previous years and had furnished the necessary materials to justify the set off of loss against business income and the Id. AO was not justified in insisting that the contract notes should be furnished before allowing such set off.

7. We have duly considered the facts and circumstances of the case. It is a fact that in previous years, the issue of whether derivative trading done by the assessee can be regarded as a business loss has been considered and decided in favour of the assessee by the ITAT specifically in the assessment years 2012-13 and 2013-14. On the strength of this judgment, the assessee has been claiming the derivative loss of this year also as business loss. However, as the Id. Sr. DR has correctly pointed out, the principle of res judicata does not apply to income tax proceedings. In income tax

proceedings, the assessee must furnish the basic details that are called for to bring himself within the ambit of the beneficial provisions of the Explanations 1 & 2 to section 43(5) that allow the income / loss from derivative trading to be considered as a business income of the loss – by submitting the necessary information to the Id. AO to demonstrate that he meets the conditions laid down in the Explanations and audited trading account is not a substitute for the documents that are required to be examined by the Id. AO as per the Explanations to section 43(5). Ideally, the assessee should submit the time stamped contract notes but considering that the time stamped contract notes may be very voluminous, the ITAT has held that where the assessee furnishes a statement of account from its brokers certifying that the trades have actually taken place and yielded the results claimed by the assessee, there is no reason to doubt that the conditions of the Explanations had been met. There is a controversy in this year as to whether such statements from brokers have been submitted or not. The Id. AR submits that he has filed the statements vide his submission dated 10.08.2017 but the Id. Sr. DR disputes this, stating that though the submission state that they are being filed, in fact they have not been filed. The Id. CIT(A) has also disallowed the appeal of the assessee on this account. We have also considered the submission of the assessee that he has filed digital copy of the contract notes immediately after the survey on his hard disk, but we note that there is no evidence presented before us, that the hard disk that were impounded / handed over, contained the digital copies of the contract notes. Furthermore, as the Id. Sr. DR has pointed out, these could only contain the details upto 17.12.2014 and not beyond because the survey was conducted in the middle of the year. Therefore, it is fairly clear that the assessee has not filed these details before the Id. AO which are required to satisfy the Id. AO that the assessee fulfills all the conditions that are laid down in the Explanations 1 & 2 to section 43(5). Be that as it may, we also observe that enquiries have been made under section 133(6) with the brokers, the results of which have not been brought on record. We also cannot be oblivious to the history of the assessee's case where the

assessee has, year after year, been trading in derivatives through the exact same brokers and in previous years, the trades have been held to be of such a nature that they fulfilled the conditions, as laid down in the Explanations to section 43(5). In the circumstances, in order to arrive at the truth of the nature of the income / loss, we believe it is in the interest of justice that the matter should be restored to the file of the Id. AO for examination of the material to determine whether the trade executed by the assessee meet the conditions of the Explanations 1 & 2 to section 43(5). Therefore, since the matter is being restored to the file of the Id. AO for a fresh decision in accordance with law, the appeal of the assessee is held to be allowed for statistical purposes.

8. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 31.07.2025.

Sd/-
[SUBHASH MALGURIA]
JUDICIAL MEMBER

Sd/-
[NIKHIL CHOUDHARY]
ACCOUNTANT MEMBER

DATED: 31/07/2025

Sh

Copy forwarded to:

1. Appellant –
2. Respondent –
3. CIT DR , ITAT,
4. CIT,
5. The CIT(A)

By order
Sr. P.S.