

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'F' BENCH MUMBAI
BEFORE: SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER**

ITA No. 3144/MUM/2018 (AY: 2012-13)

ITA No. 6362/MUM/2018 (AY: 2013-14)

DCIT 4(3)(1), Mumbai, R.No. 649, 6 th Floor, Aayakar Bhavan, Mumbai- 400 020.	Vs.	JM Financial Services Ltd. 7 th Floor, Cnergy Appasaheb Marathe Marg, Prabhadevi, Mumbai- 400025.
PAN: AAACJ 5977 A		
(Appellant)	..	(Respondent)

ITA No. 3175/MUM/2018 (AY: 2012-13)

ITA No. 6114/MUM/2018 (AY: 2013-14)

JM Financial Services Ltd. 7 th Floor, Cnergy Appasaheb Marathe Marg, Prabhadevi, Mumbai- 400025.	Vs.	DCIT 4(3)(1), Mumbai, R.No. 649, 6 th Floor, Aayakar Bhavan, Mumbai- 400 020.
PAN: AAACJ 5977 A		
(Appellant)	..	(Respondent)

Assessee by	Shri. K. Shivram Advocate
Revenue by	Shri. Pravin Salunkhe, Sr. DR
Date of Hearing	26/09/2025
Date of Pronouncement	14 /10/2025

Order under section 255 (4) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. Owing to the difference of opinion between the esteem members of the Division Bench, the Hon'ble President of Income Tax Appellate Tribunal deemed it

appropriate to nominate a Third member to adjudicate the dispute between the members constituting the bench.

2. The Hon'ble Vice President/ Third Member concurred with the view expressed by Judicial Member and ruled as under;

"15. I noted that the assessee has set off the delivery based transaction of share are linked with F&O based transactions and they form a continuum of string of transactions of the nature of arbitrage operations. The assessee's arguments are considered but are not tenable because Section 43(5) of the Act lists out the circumstances in which certain transactions are to be treated as speculation and also the case where such speculation transactions have been treated as business transactions when some conditions are satisfied. The assessee's argument that it is doing arbitrage with respect to F&O cuts no ice because the undersigned is in agreement with the assessee that F&O transactions are to be treated as business transaction by virtue of provisions (d) of Section 43(5) of the Act. The assessee's argument makes sense if Revenue was to treat as transactions as speculation with respect to F&O. Post amendment to Section 43(5) of the Act vide the insertion of the proviso, it is clear that income from F&O transactions are to be treated as business income. Now, having treated F & O transactions as business transactions, while setting off loss arrived from delivery based transactions, the AO has to look into the chapter which provides the methodology for set off and carry forward of loss. Here, Section 73 of the Act operates independently of any other provisions. As per explanation to Section 73 of the Act, any company whose primary business is dealing in shares and upon fulfilling certain conditions, which is the fact in the instant case, loss determined from such share trading has to be deemed as speculation loss and can be set off against speculation income. In the current case, the assessee derives loss from delivery based share trading and fulfills conditions mentioned in Explanation to Section 73 of the Act and hence, the loss cannot be allowed to be set off against F & O loss,

even though it is specifically treated as business income by virtue of Section 43(5) of the Act. In similar facts, Hon'ble High Court of Delhi has rendered its decision with respect to Explanation to Section 73 of the Act treating the loss arising from such transactions as loss from F&O has to be treated as speculation loss and further to emphasize a legal principle that Explanation to Section 73 of the Act operates independently of Section 43 (5) of the Act and any speculation loss cannot be set off against business income. The excerpts of the decision of the Delhi High Court in the case of CIT Vs. DLF Commercial Developers Pvt. Ltd. – [2013] 218 Taxman 45/[2013] 35 taxmann.com 280 (Delhi) is as follows:-

"11.The stated objective of section 73 –apparent from the tenor of its language is to deny speculative business the benefit of carry forward of losses .Explanation to section 73(4) has been enacted to clarify beyond any shadow of doubt that share business of certain types or classes of companies are deemed to be speculative. That in another part of the statute, which deals with computation of business income, derivatives are excluded from the definition of speculative transactions, only underlines that such exclusion is limited for the purpose of those provisions or section. To borrow the Madras High Court's expression, (a) derivatives are assets whose values are derived from values of underlying assets, in the present case, by all accounts the derivatives are based on stocks and shares, which fall squarely within the explanation to section 73(4). Therefore, it is idle to contend that derivatives do not fall within that provision, when the underlying asset itself does not qualify for the benefit, as they (derivatives – once removed from it and entirely dependent on stocks and shares, for determination of their value).

12.In the light of the above discussion, it is held that the Tribunal erred in law in holding that the assessee was entitled to carry forward its losses, the question framed is answered in favour of the revenue and against the assessee. The appeal is, therefore, allowed, there shall be no order as costs."

16.I also noted from the argument of learned Counsel for the assessee that the issue is covered by the decision of this Tribunal in assessee's

own case in ITA No.3654& 3660/M/2014 dated 28th December, 2016 for AY 2009-10, wherein the Tribunal, vide Paragraph 21 and 22, has allowed the appeal of the assessee as under:-

"21. We have considered the rival contentions. In this case, the peculiarity of the business of the assessee is that the assessee so manages his transactions of sale and purchase in shares in cash segment and in future segment that the final outcome will be a profit. The transactions of the assessee, therefore, cannot be segregated to arrive at profit and loss in both these transactions independently or separately. The nature of the business of the assessee is such that the transactions of the assessee in both segments are part of composite business of the assessee and the transactions are so managed that the resultant figure will be a profit. We, therefore, do not find any justification on the part of the lower authorities to interpret the provisions of the Income Tax Act to the disadvantage of the assessee and to segregate the transactions in cash and future segment which, in our view, will be against the spirit of the taxation laws. Even otherwise the case of the assessee is squarely covered by the decision of the Hon'ble Delhi High Court in the case of CIT vs. DLF Commercial Developers (supra) wherein the Hon'ble Delhi High Court has categorically held that in terms of Explanation to section 73, by all accounts, derivatives are based on stocks and shares which fall squarely within Explanation to section 73 and therefore loss from sale-purchase of such derivatives would be speculative loss. The Hon'ble Delhi High Court has, thus, held that though under provisions of section 43(5), the transactions in derivatives at certain stock exchanges are deemed to be non- speculative, however, as per the Explanation to section 73 for the purpose of computation of business loss the derivative transactions squarely fall within the scope of Explanation to section 73. Under the circumstances, both the transactions i.e. the transactions in the derivative and transactions in the cash segment can be treated as speculative transactions as per Explanation to section 73 and hence the profit or loss against both the segments can be adjusted or set off against each other.

22. Even otherwise as discussed above, the peculiarity of the business of the assessee is such that the transactions carried out by the assessee in cash segment and in future segment cannot be segregated. The business of the assessee survives on the ultimate resultant figure arrived at after setting off/adjusting of the profit and loss from each segment. It cannot be said that the transactions in each segment done by the assessee are independent of each other. Before parting we would like to further add that certain exceptions have been carved out under section 43(5) vide which certain transactions in derivative named as 'eligible transactions', done on a recognized stock exchange, subject to fulfillment of certain requirements, are deemed to be non-speculative. The said provisions have been inserted in the Act for the benefit of the assesseees keeping in view the fact that in such type transactions on recognized stock exchange, the chance of manipulating and thereby adjusting the business profits towards speculative losses by the assessee is negligible because such transactions are done on recognized stock exchange and there are less chances of manipulation of figures of profits and losses. These provisions have been inserted for the benefit of the assessee so that the assessee may be able to set off and adjust his profit and losses from derivatives incommodities against the normal business losses.

These provisions are intended to ease out the assessee from the difficulties faced due to the stringent provisions separating the speculative transactions from the normal transactions. However, these exclusions given to the assessee cannot be allowed to be so interpreted to the disadvantage of an assessee so as to give it a different meaning and thereby denying the assessee the set off of otherwise eligible business loss from one segment as against the other segment, especially when the activity done by the assessee is a composite activity and profit and loss in one segment not only depends but the very transaction is done taking into consideration not 'expected' but certain future profit or loss in other segment."

17 I noted from the decision of the Tribunal in assessee's own case that the Tribunal has noted the fact that both the activities i.e., transactions

of sale and purchase in cash segment and also in future segment fall under speculation activity, which is not the case in the year under consideration. Hence, that ratio cannot be applied in the present assessment year. I also noted that this decision of the Tribunal for assessment year 2009-10 was carried by the Revenue before Hon'ble Bombay High Court, and, Hon'ble Bombay High Court in Income Tax Appeal No.263 of 2018, Order dated 18th August, 2022, admitted the substantial question of law as under:-

"4. We admit the present appeal on the following substantial questions of law:

"(2) Whether in the facts and circumstances of the present case, the Tribunal was justified in directing the Assessing Officer to delete the disallowance of Rs.21,48,928/- made u/s14A read with Rule 8D of the Income Tax Act, 1961?"

"(3) Whether in the facts and circumstances of the present case and in law, the Tribunal was justified in directing the Assessing Officer to delete the disallowance made towards set off of loss of cash segment against the income from Futures & Options segment as the assessee's business is covered by the Explanation to Section 73 of the Income Tax Act, 1961?"

During the course of hearing before me, both learned Counsel for the assessee as well as learned CIT-DR informed that this matter is pending before Hon'ble Bombay High Court.

18 I further noted that Hon'ble Supreme Court in the case of Snowtex Investment Ltd.(supra)categorically noted in Paragraph 30 and 31 that the latter amendment was intended to take effect from the date stipulated by Parliament and there is no reason to hold either that it was clarificatory or that the intent of Parliament was to give it retrospective effect. Hon'ble

Supreme Court also discussed the facts of that case that the consequence is that in assessment year 2008-09, the loss which occurred to the assessee as a result of its activity of trading in shares was not capable of being set off against the profits which it had earned against the business of future and options, since the latter did not constitute profits and gains of a speculative business. Hon'ble Supreme Court finally held as under:-

"30. In conclusion, we therefore, hold that the amendment which was brought by Parliament to the Explanation to Section 73 by the Finance (No 2) Act 2014 was with effect from 1 April 2015. In its legislative wisdom, the Parliament amended Section 43(5) with effect from 1 April 2006 in relation to the business of trading in derivatives, Parliament brought about a specific amendment in the Explanation to Section 73, in so far as trading in shares is concerned, with effect from 1 April 2015. The latter amendment was intended to take effect from the date stipulated by Parliament and we see no reason to hold either that it was clarificatory or that the intent of Parliament was to give it retrospective effect.

31. The consequence is that in A.Y. 2008-09, the loss which occurred to the assessee as a result of its activity of trading in shares (a loss arising from the business of speculation) was not capable of being set off against the profits which it had earned against the business of futures and options since the latter did not constitute profits and gains of a speculative business."

19 From the above discussion, facts of the present case, I am of the opinion that while the F & O income has to be treated as business income, the loss derived from delivery based share trading has to be treated as speculation loss and accordingly, the set-off is not allowed.

20 Now, in view of the above discussion and legal position, I answer the question as under:-

Question framed by the Bench	Answer to the Question
<p>1. Whether the Ld. CIT(A) was justified in holding that the loss in share trading(speculative transaction) could be setoff against the profit in Future and Option (F&O) transactions (business transaction)in the facts and circumstances of the instant case, more particularly in the light of the decision of Hon'ble Supreme Court in the case of Snowtex Investment Limited v. PCIT [414 ITR 227] and decision of the Hon'ble Madhya Pradesh High Court in the case of Diamond Securities Pvt. Ltd. [115 Taxmann.com 437].</p> <p>And Consequently, expenses allocated towards share tradingconstitutes share trading loss in the facts and Circumstances of the instant case.</p>	<p>In the given facts and circumstances of the case, discussion carried above, the answer to this question is in the negative.</p>

21 In terms of the above, I concur with the decision of learned Judicial Member allowing the appeal of the Revenue on this question.

3. In view of the majority opinion, we hold that the F & O income has to be treated as business income, the loss derived from delivery based share trading has to be treated as speculation loss and accordingly, the set-off is not allowed.

4. In the result, the appeals filed by the revenue are allowed and the appeals filed by the assessee are allowed for statistical purpose.

Order pronounced in open court on 14.10.2025.

Sd/-

(NARENDRA KUMAR BILLAIYA)

ACCOUNTANT MEMBER

Sd/-

(PAWAN SINGH)

JUDICIAL MEMBER

Mumbai; Dated 14/10/2025
Disha Raut, *Steno*

Copy of the Order forwarded to:

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

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai