

**IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Sandeep Gosain, Judicial Member**

ITA No. 5588/Mum/2014
(Assessment Year: 2009-10)

DCIT, Circle - 6(2) Room No. 563, 5 th Floor Aayakar Bhavan, M.K. Road Mumbai 400020	Vs.	M/s. Free India Assurance Services Ltd. 209, Prime Plaza, J.V. Compound B.M. Road, Elephistone (W) Mumbai 400013
--	-----	--

PAN - AAACF3879K

Appellant

Respondent

ITA No. 5934/Mum/2014
(Assessment Year: 2009-10)

M/s. Free India Assurance Services Ltd. 209, Prime Plaza, J.V. Compound B.M. Road, Elephistone (W) Mumbai 400013	Vs.	ACIT, Circle - 6(2) 5 th Floor, Aayakar Bhavan M.K. Road, Mumbai 400020
--	-----	--

PAN - AAACF3879K

Appellant

Respondent

Revenue by:	Capt. Pradeep Arya
Assessee by:	Shri Subodh Ratnaparkhi

Date of Hearing:	13.04.2016
Date of Pronouncement:	27.04.2016

ORDER

Per Jason P. Boaz, A.M.

These are cross appeals by the Revenue and the assessee directed against the order of the CIT(A)-12, Mumbai dated 27.06.2014 for A.Y. 2009-10.

2. The facts of the case, briefly, are as under: -

2.1 The assessee, a company engaged in the business of marketing of consumer durable products, filed its return of income for A.Y. 2009-10 on 29.09.2009 declaring total income of ₹10,75,225/- and claimed current year's loss of ₹5,68,80,336/- from business. The assessee filed a revised

return of income on 20.02.2010 declaring total income of ₹1,24,11,742/- and claimed loss of ₹5,68,80,336/- from speculation business to be carried forward. The revised return was processed under section 143(1) of the Income Tax Act, 1961 (in short 'the Act') and the case was subsequently taken up for scrutiny. The assessment was completed under section 143(3) of the Act vide order dated 16.12.2011, wherein the income of the assessee was determined at ₹1,33,32,800/- in view of disallowance of ₹9,21,062/- under section 14A r.w. Rule 8D.

2.2 Aggrieved by the order of assessment for A.Y. 2009-10 dated 16.12.2011, the assessee preferred an appeal to the CIT(A)-12, Mumbai. The learned CIT(A), vide order dated 27.06.2014, not only dismissed the grounds raised in assessee's appeal with regard to the disallowance under section 14A w.r. Rule 8D, but further went on beyond the grounds raised to direct the Assessing Officer (AO) in the form of observations to verify and disallow loss of ₹1,84,10,736/- on derivative transactions as being speculation loss in terms of Explanation to section 73 of the Act after affording the assessee an opportunity of being heard.

3. Both Revenue and the assessee are aggrieved by the order of the CIT(A)-12, Mumbai dated 27.06.2014 and have filed appeals before the Tribunal.

Assessee's appeal in ITA No. 5934/Mum/2014 for A.Y. 2009-10

3.1 The grounds raised in assessee's appeal are as under: -

- “1A. The ld. CIT (A) erred in confirming the addition of **Rs. 9,21,062/-** made u/s 14A of the I.T. Act 1961 r.w. rule 8D of IT Rules.*
- 1B. The ld. CIT (A) erred in not appreciating the argument that unless there existed any nexus between the expenses incurred and income which does not form part of total income, disallowance u/s 14A was not justified.*
- 1C. The ld. CIT (A) erred in confirming the addition u/s 14A r.w. rule 8D inspite of the fact that ld AO had not given any finding that any expenditure was incurred by the appellant for earning tax free income.*
- 2. The ld. CIT (A) erred in giving directions to the AO with regards to loss of Rs.1,84,10,736/- arising from derivatives (future & options) trading, inspite of the fact that the said issue was not the*

subject matter of appeal before the CIT (A) and therefore was a new source of income which was not considered by the AO in assessment and therefore could not be taken by the CIT (A) in proceeding before him.

3. *The ld. CIT (A) erred in giving directions to the AO with regards to loss of Rs.1,84,10,736/- from derivatives (future & options) trading, which amounted to enhancement of assessment, without affording the appellant reasonable opportunity of showing cause against such enhancement as provided u/s 249(2) of the IT Act, 1961 and therefore such directions were not tenable by law.*
4. *The appellant craves leave to add, alter, amend, delete and/or vary any of the above grounds of appeal at any time before the decision of the appeal."*

Revenue's appeal in ITA No. 5588/Mum/2014 for A.Y. 2009-10

3.2 The grounds raised in Revenue's appeal are as under: -

1. *On the facts and circumstances of case and in law, the Ld.CIT(A) erred in directing the A.O. to verify and to take remedial action, as the 'financial charges' claimed by the assessee also includes 'speculative loss' of Rs.1,84,10,736/-, not allowable as a business deduction/ expenditure, without appreciating the fact that the A.O. is not empowered under the Act to revisit the assessment once completed u/s. 143(3).*
2. *On the facts and circumstances of case and in law, the Ld.CIT(A) erred in giving direction to A.O. to verify loss from derivatives after giving opportunity of being heard to the assessee, without appreciating the fact that the Ld. CIT(A) is empowered by virtue of section 251(1)(a) of the I.T. Act, to confirm, reduce, enhance or annul the assessment but has no power to set aside an issue not arising from the assessment order to the A.O. for verification."*

These cross appeals will be disposed off as under in seriatum: -

Assessee's appeal in ITA No. 5934/Mum/2014 for A.Y. 2009-10

4. Grounds No. 1A to 1(C)

4.1 In these grounds (supra), the assessee has assailed the impugned order of the learned CIT(A) in confirming the disallowance of ₹9,21,062/- made under section 14A of the Act r.w. rule 8D of the IT Rules inspite of the fact that the AO had not given any finding that any expenditure was in fact, incurred by the assessee to earn the exempt income or established that there was any nexus between the expenses incurred and the exempt income. At the outset, the learned A.R. for the assessee brought to the notice of the Bench that this very issue of disallowance under section 14A

r.w. rule 8D was considered by a Coordinate Bench of the Tribunal in the assessee's own case for A.Y. 2008-09 and the matter was restored to the file of the AO for reconsideration. It was prayed that in these circumstances the matter be accordingly set aside to the file of the AO for de novo consideration in this year also.

4.2.1 We have heard the rival contentions of the parties and perused and carefully considered the material on record, including the judicial pronouncement cited (supra). We find that a Coordinate Bench of this Tribunal, while considering the very same issue of disallowance under section 14A r.w. Rule 8D for A.Y. 2008-09 in the assessee's own case in ITA No. 2219/Mum/2012 dated 28.07.2014 had restored the issue back to the file of the AO for de novo consideration after affording the assessee adequate opportunity of being heard and to file details/submissions required in the matter. At para 5 to 7 of the order the Coordinate Bench held as under: -

"5. We have considered the rival submissions of the ld. representatives of the parties. It may be observed that in the case of 'Godrej & Boyce Manufacturing Co. Ltd.' 328 ITR 81, the Hon'ble Bombay High Court has held that Rule 8D r.w.s. 14A(2) is not arbitrary or unreasonable and also not retrospective and applies from A.Y. 2008-09. It has been further held that under section 14A of the Income Tax Act, resort can be made to Rule 8D of the Income Tax Rules for determining the amount of expenditure in relation to exempt income, if, the AO is not satisfied with the correctness of the claim made by the assessee in respect of such expenditure. The satisfaction of the Assessing Officer has to be arrived at, having regard to the accounts of the assessee. Sub section (2) does not ipso facto enable the Assessing Officer to apply the method prescribed by the rules straightaway without considering whether the claim made by the assessee in respect such expenditure is correct. The satisfaction of the Assessing Officer must be arrived at on an objective basis. In a situation where the accounts of the assessee furnish an objective basis for the Assessing Officer to arrive at a satisfaction in regard to the correctness of the claim of the assessee, there would be no warrant for taking recourse to the method prescribed by the rules. An objective satisfaction contemplates a notice to the assessee, an opportunity to the assessee to place on record all the relevant facts including his accounts and recording of reasons by the Assessing Officer in the event that he comes to the conclusion that he is not satisfied with the claim of the assessee.

6. However, a perusal of the assessment order reveals that the AO has not followed the guidelines of objective satisfaction as laid down by the hon'ble Bombay high Court in the case of Godrej & Boyce (supra) while making the disallowance. He without recording any reasoning for his dissatisfaction with regard to the working/claim of the assessee, straightway applied Rule 8D against the mandate of the provisions of section 14A of the Income Tax Act. The ld. CIT(A) also ignored the mandate of the provisions of section 14 A, while confirming the disallowance.

7. So keeping in view of the overall facts and circumstances of the case, we restore this issue back to the file of the AO with a direction that the AO will give opportunity to the assessee to place on record all the relevant facts including its accounts and then examine the computation/calculation made in this regard by the assessee having regard to the accounts of the assessee. The AO will be at liberty to call for any record/evidences or statement etc. from the assessee as may be required by him for deciding the issue under consideration. After going through the details provided by the assessee, if the AO will be satisfied with the claim/calculation made by the assessee, then he will assess the income accordingly. However, if the AO does not agree with the computation made by the assessee and in that event, he will have to record his dissatisfaction with reasoning for the same by way of a speaking order, then he will be at liberty to resort to the provisions of Rule 8D. Needless to say, the assessee will co-operate and promptly supply the necessary details etc. to the AO for deciding the issue under consideration.”

4.2.2 Following the aforesaid decision of the Coordinate Bench of this Tribunal in the assessee's own case in ITA No. 2219/Mum/2012 dated 28.07.2014, and keeping in mind the facts and circumstances of the case, we restore the issue of disallowance under section 14A of the Act r.w. Rule 8D of the IT Rules to the file of the AO with a direction to consider the issue afresh, after affording the assessee adequate opportunity of being heard and to submit details/submissions required in the matter, and to then adjudicate the matter in accordance with the directions and procedure laid down in paras 5 to 7 of the order of the Coordinate Bench cited (supra). Consequently grounds No. 1A to 1(C) of the assessee's appeal are treated as allowed for statistical purposes.

5. **Ground Nos. 2 & 3**

5.1 In **ground No. 2** the assessee contends that the learned CIT(A) erred in giving directions to the AO to verify the assessee's claim of loss of ₹1,84,10,736/- from derivative transactions (futures and options trading)

inspite of the fact that the said issue was not the subject matter of appeal before the learned CIT(A). This was a new source of income, which was not considered by the AO in assessment, and therefore the same could not have been taken by the learned CIT(A) in proceedings before him. In support of the above proposition that the learned CIT(A) has no power to enhance the assessment by discovering a new source of income not considered by the AO in the order appealed against, the learned A.R. for the assessee for the assessee, inter alia, placed reliance on the following judicial pronouncements: -

- (i) CIT vs. Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443 (SC)
- (ii) CIT vs. Shapoorji Pallonji Mistry (1962) 44 ITR 891 (SC)
- (iii) CIT vs. Sardari Lal and Co. (2001) 251 ITR 864

5.2 In **ground No. 3** the assessee contends that the learned CIT(A) erred in giving the directions to the AO with regard to the loss ₹1,84,10,736/- from derivatives (future and options) trading which amounted to enhancement without affording the assessee adequate opportunity of showing cause against such enhancement as provided in section 251(2) of the Act and therefore such directions were not tenable in law. The learned A.R. for the assessee was heard in support of the grounds raised. In support of the proposition that the learned CIT(A) could not enhance income without giving opportunity as provided under section 251(2) of the Act, the learned A.R. for the assessee placed reliance on the decision of the Hon'ble Madras High Court in the case of CIT vs. Lotte India Corporation Ltd. (2007) 290 ITR 248 (Mad).

5.3.1 We have heard both the learned D.R. for Revenue and the learned A.R. for the assessee in the matter and perused and carefully considered the material on record, including the judicial pronouncements cited. At the outset it would be appropriate to mention at this juncture that the learned CIT(A), after dismissing the grounds raised by the assessee in the appeal before him, then proceeded to record the following observation and directions to the AO in the impugned order at para 7 thereof: -

“7. Observation as to speculative loss claimed as a business deduction, with an advice to fake remedial measure therefor -

Without prejudice to the dismissal of the present appeal, an attention of the A.O. is drawn to one aspect as to omission of consideration of loss from derivatives' transactions in Future & Options segment within the meaning of Explanation to Section 73 of the Act. During the appellate proceedings, the Profit & Loss Account and Balance Sheet were examined and on perusal thereof, it is found that the appellant has claimed financial charges of Rs.7,56,00,847/- as a deduction. On further verification of Schedule '14' annexed to the financial statements for the year, it is noticed that the **said financial charges include loss on derivatives (F&O) trading amounting to Rs.1,84,10,736/-**. It is surprising as to how the appellant had categorized the said loss on derivatives amounting to Rs.1,84,10,736/- as financial charges and claimed as such, because in ordinary meaning, financial charges refer to 'interest' etc. expenses incurred for the purpose of business. As mentioned by the A.O., the nature of appellant's business is that of marketing of consumer durable products. On perusal of the Computation of Total Income, it is seen that the appellant has shown loss from trading in shares & commodities amounting to Rs.5,68,80,336/- separately as "speculative loss" within the meaning of Explanation to Section 73 of the Act. However, it appears that the appellant had not reduced or excluded the loss on derivatives in F&O trading amounting to Rs.1,84,10,736/- from its claim made under the head 'financial charges' and not treated the same as 'speculative loss' within the meaning of Explanation to Section 73 of the Act. In other words, it appears that the appellant had claimed the said loss as a part of its business deduction under the head 'financial charges' whereas the appellant's business is stated to be that of marketing of consumer durable products. It appears that the A.O. had not examined the applicability of Explanation to Section 73 of the Act in respect of the said loss of Rs.1,84,10,736/- from derivatives (F&O) trading. In this regard, attention is drawn to a decision of the Hon'ble Delhi High Court in the case of **CIT vs. DLF Commercial Developers Ltd [2013] 35 taxmann.com 280 [vide order dated 11.07.2013 in ITA No.94/2013]**, the Headnote and the relevant portion of findings of which are reproduced hereunder;

"Section 43(5), read with section 73, of the Income-tax Act, 1961 - Speculative transactions [Derivatives] - Whether definition of 'speculative transaction' as indicated in section 43(5) is restricted in its application to working out mandate of sections 28 to 41 only - Held, yes - Whether in terms of Explanation to section 73, in case of certain types or classes of companies business of purchase and sale of shares is deemed to be speculation business - Held, yes - Whether where by all accounts derivatives were based on stocks and shares, which fall squarely within Explanation to section 73, loss from sale-

purchase of such derivative would be speculative loss, which could not be permitted to be carried forward - Held, yes [Paras 7 and 11] [In favour of revenue]"

"The term 'speculative transaction' has been defined only in section 43(5). At the same time, it is qualified that the scope of the definition is restricted in its application to working out the mandate of sections 28 to 41. In terms of the Explanation to section 73 in the case of a company, business of purchase and sale of shares is deemed to be speculation business. However, certain companies are excluded from this Explanation, which are:

(i) a company whose gross total income consists mainly of income which is chargeable under the heads 'Interest on securities', 'Income from house property', 'Capital gains' and 'Income from other sources'.

(ii) a company, the principal business of which is the business of banking or the granting of loans and advances. [Para 7]

Section 43 defines for the purpose of sections 28 to 41 certain terms. These latter provisions fall in Chapter IV - D, which deal with computation of business income. The said provisions provide for matters relating to computation of such income, rent taxes, insurance of buildings, repairs of plant and machinery, depreciation, reserves for shipping business, rehabilitation fund, expenditure on certain eligible objects or schemes, deductions, amounts not deductible, profits chargeable to tax, etc. The assessee is no doubt correct in contending that the only definition of 'derivatives' is to be found in section 43(5), yet the Court cannot ignore or overlook that the definition to the extent it excludes such transactions from the mischief of the expression 'speculative transactions' is confined in its application. Parliamentary intendment that such transactions are also excluded from the mischief of Explanation to section 73, however, is not borne out. [Para 8]

It is no doubt tempting to hold that the expression 'derivatives' is defined only in section 43(5) and it excludes such transactions from the odium of speculative transactions, yet the Court would be doing violence to Parliamentary intendment. This is because a definition enacted for only a restricted purpose or objective should not be applied to achieve other ends or purposes, Doing so would be contrary to the statute. Thus contextual application of a definition or term is stressed, wherever the context and setting of a provision indicates an intention that an expression defined in some other place in the enactment, cannot be applied, that intent prevails, regardless of whether standard exclusionary terms (such as 'unless the context otherwise requires) are used [Para 10]

The stated objective of section 73 apparent from the tenor of its language is to deny speculative businesses the benefit of carry forward of losses. Explanation to section 73 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 sections. In the instant case, by all accounts the derivatives are based on stocks and shares, which fall squarely within the Explanation to section 73. Therefore, it is idle to contend that derivatives do not fall within that provision. [Para 11]

Therefore, the order passed by the Tribunal was not justified [Para 12]"

In view of the above cited decision and also as per provisions of Explanation to Section 73 of the Act, the appellant ought to have treated the said loss of Rs.1,84,10,736/- as 'speculative loss' and it ought not to have claimed it as a business deduction under any head of expenditure, whether it be 'financial charges'. Thus, it appears that there is misleading nomenclature i.e. 'financial charges' under which the appellant has claimed such a huge loss from derivatives (F&O) trading as a business deduction / expenditure (in particular 'financial charges'). This fact also requires thorough verification on the part of the A.O. Therefore, the A.O. is directed to examine the relevant facts and take necessary remedial measure in accordance with the provisions of law and also having regard to the of afore-cited decision, after providing an opportunity of being heard to the appellant. The A.O. is advised to apply the aforesaid decision in other appropriate cases also."

5.3.2 From the perusal of para 7 of the impugned order (supra) and the order of the assessment in the case on hand for A.Y. 2009-10, it is clearly evident that the learned CIT(A) in issuing the directions, he did to the AO, went beyond the grounds raised in the assessee's appeal and the issues which were the subject matter of the order of assessment, thereby clearly exceeding his jurisdiction in the matter. The Hon'ble Delhi High Court in the case of CIT vs. Sardari Lal and Co. (2001) 251 ITR 864 has held that the learned CIT(A) has no power to direct the AO to bring to tax a new source of income, which was not considered by the AO in the order appealed against him. It was observed by the Hon'ble High Court that wherever the question of taxability of income from a new source of income is concerned, which has not been considered by the AO, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 and 263 if requisite conditions are fulfilled. It was also observed that in the presence of such specific provisions, the learned CIT(A) had no

power to tax a new source of income not considered by the AO in the order of assessment which was appealed against before him. In coming to this finding the Hon'ble Delhi High Court approved its own decision in the case of CIT vs. Union Tyre (1999) 240 ITR 556) and applied the decisions of the Hon'ble Apex Court in ICT vs. Shapoorji Pallonji Mistry (1962) 44 ITR 891 (SC) and CIT vs. Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443 (SC). Respectfully following the aforesaid decisions of the Hon'ble Apex Court (supra) and the Hon'ble Delhi High Court in the case of CIT vs. Sardari Lal and Co. (2001) 251 ITR 864 we hold that the learned CIT(A) had no power to issue directions to the AO as done in para 7 of the impugned order (supra) to bring to tax a new source of income, which was not the subject matter of appeal in the order appealed against before him. In this view of the matter, we delete the directions/observations issued by the learned CIT(A) to the AO at para 7 of the impugned order on the issue of verification and disallowing business loss from derivative (futures and options) trading amounting to ₹1,84,10,736/-. Accordingly, ground No. 2 of the assessee's appeal is allowed.

5.3.3 The observations and directions of the learned CIT(A) in para 7 of his order (supra) that it is not clear as to how the business loss from derivatives (futures and options) trading amounting to ₹1,84,10,736) has been allowed by the AO, expressing his disagreement therewith and further directing the AO to re-examine this issue, in our view, can lead to a possible enhancement of assessment and/or levy of penalty as the case may be. In these circumstances, as contemplated under section 251(2) of the Act, the learned CIT(A), in not affording the assessee reasonable opportunity to show cause against such adverse findings/directions to the AO for examination of a fresh issue that could lead to possible enhancement, etc., committed an error. In the case of CIT vs. Lotte India Corporation Ltd. (2007) 290 ITR 248 (Mad) the Hon'ble High Court on similar facts upheld the proposition that the learned CIT(A) had committed an error in denying the assessee opportunity of being heard as contemplated under section 251(2) of the Act before rendering a finding expressing disagreement with certain expenditure allowed by the AO and making observations/issuing

directions to the AO to examine an issue that could lead to a possible enhancement of assessment. Respectfully following the aforesaid decision of the Hon'ble Madras High Court in the case of in the case of Lotte India Corporation Ltd. (supra) we hold that the learned CIT(A) erred in rendering such observation and directions on the issue of losses of ₹1,84,10,736/- from derivatives (futures and options) trading without affording the assessee reasonable opportunity of being heard as contemplated under section 251(2) of the Act as the re-examination of this issue could lead to an enhancement in assessment. We, consequently, delete the directions/ observations of the learned CIT(A) in para 7 of the impugned order. Accordingly, ground No. 3 of the assessee's appeal is allowed.

6. Ground No. 4 being general in nature and not urged before us, the same is dismissed as infructuous.

7. In the result, the assessee's appeal for A.Y. 2009-10 is partly allowed.

Revenue's appeal in ITA No. 5588/Mum/2014 for A.Y. 2009-10

8. Grounds at S. Nos. 1 & 2

8.1 In these grounds, Revenue contends that the learned CIT(A) erred in directing the AO to verify and take remedial action in respect of 'speculative loss' of ₹1,84,10,736/- not allowable as a business deduction/expenditure as the AO is not empowered under the Act to revisit the assessment completed under section 143(3) of the Act. It is contended that the learned CIT(A) has no power to set aside an issue not arising from the order of assessment to the AO for verification and that he ought to have taken action under section 251(1)(a) of the Act to enhance the assessment.

8.2.1 We have heard both parties and perused the material on record. Since we have already held, in para 5.3.2 and 5.3.3 (supra) of this order while dealing with ground No. 2 of the assessee's appeal, that the observations/directions issues by the learned CIT(A) in para 7 of the impugned order are beyond the powers given to him under the Act and

therefore stand deleted, consequently grounds No. 1 & 2 of Revenue's appeal are rendered infructuous and accordingly dismissed.

9. In the result, the assessee's appeal for A.Y. 2009-10 is partly allowed and Revenue's cross appeal is dismissed.

Order pronounced in the open court on 27th April, 2016.

Sd/-
(Sandeep Gosain)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 27th April, 2016

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -12, Mumbai*
4. *The CIT- 6, Mumbai*
5. *The DR, "F" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.