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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 278 OF 2014

Commissioner of Income Tax-16, Mumbai	..Appellant
<i>Versus</i>	
M/s.D. Chetan & Co.	..Respondent

Mr.A.R. Malhotra for Appellant.

Mr.R. Murlidhar with Mr.P.C. Tripathi for Respondent.

**CORAM: M. S. SANKLECHA &
S.C. GUPTE, JJ.**

DATE : 1 OCTOBER 2016

P.C. :

This appeal under Section 260A of the Income Tax Act, 1961 (Act) challenges the order dated 14 August 2013 passed by the Income Tax Appellate Tribunal (Tribunal). The impugned order relates to assessment for Assessment Year 2009-10.

2. The Revenue has urged the following question of law for our consideration :-

“Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the addition of 'Mark to Market' Loss of Rs.78,10,000/- made by the Assessing Officer on account of disallowance of loss on foreign exchange forward contract loss and not appreciating the fact that the said loss was a notional loss and hence cannot be allowed?

3. The Respondent Assessee is engaged in the business of import

and export of diamonds. During the assessment proceedings, the Officer found that Respondent assessee explained that the amount of Rs.78.10 lakhs claimed as loss was on account of having entered into hedging transactions to safeguard variation in exchange rates affecting its transactions of import and export by entering into forward contracts. The Assessing Officer by order of Assessment dated 27 December 2011 disallowed the claim on the ground that it is a notional loss of a contingent liability debited to Profit and Loss Account. Resultantly, the same was added to the Respondent-assessee's total income.

4. Being aggrieved, the Respondent-assessee carried the issue in appeal to the Commissioner of Income Tax (CIT (Appeals)). By order dated 27 April 2012, the CIT (Appeals) allowed the Respondent assessee's appeal *inter alia* relying upon the decisions of Tribunal in **Bhavani Gems vs. ACIT**¹ and the Special Bench decision in the case of **DCIT vs. Bank of Bahrain and Kuwait**². The CIT (Appeals) on facts found that the transaction of forward contract was entered into during the course of its business. It held it was not speculative in nature nor was it the case of the Assessing Officer that it was so. Thus the loss incurred as forward contract was allowed as a business loss.

5. Being aggrieved, the Revenue preferred an appeal to the Tribunal. The impugned order of the Tribunal upheld the finding of the CIT (Appeals) that the loss incurred by the Respondent Assessee was a revenue loss and not connected with any speculation activities. The Tribunal found that the transaction of forward contract had been entered

¹ ITA No.2855/Mum/2010 dt.30.3.2011

² (2010) 132 TTJ (Mumbai) (SB) 505

into for the purpose of hedging in the course of its normal business activities of import and export of diamonds. Thus, the Revenue's appeal was dismissed by the impugned order of the Tribunal.

6. Mr. Malhotra, learned Counsel appearing for the Revenue submits that this appeal had to be admitted as the impugned order has ignored its order in the case of **S. Vinodkumar Diamonds Pvt.Ltd. vs. Addl.CIT**³ rendered on 3 May 2013 which on similar facts is in favour of the Revenue. He further submits that the impugned order of the Tribunal is suspect because it accepts the Respondent assessee's claim without calling upon it to prove that the same was not speculative. Lastly, he sought to place reliance upon Accounting Standard-11 to claim that such a loss is not allowable thereunder.

7. The impugned order of the Tribunal has, while upholding the finding of the CIT (Appeals), independently come to the conclusion that the transaction entered into by the Respondent assessee is not in the nature of speculative activities. Further the hedging transactions were entered into so as to cover variation in foreign exchange rate which would impact its business of import and export of diamonds. These concurrent finding of facts are not shown to be perverse in any manner. In fact, the Assessing Officer also in the Assessment Order does not find that the transaction entered into by the Respondent assessee was speculative in nature. It further holds that at no point of time did Revenue challenge the assertion of the Respondent assessee that the activity of entering into forward contract was in the regular course of its business only to safeguard against the loss on account of foreign exchange variation. Even

³ ITA 506/MUM/2013

before the Tribunal, we find that there was no submission recorded on behalf of the Revenue that the Respondent assessee should be called upon to explain the nature of its transactions. Thus, the submission now being made is without any foundation as the stand of the assessee on facts was never disputed. So far as the reliance on Accounting Standard-11 is concerned, it would not by itself determine whether the activity was a part of the Respondent-assessee's regular business transaction or it was a speculative transaction. On present facts, it was never the Revenue's contention that the transaction was speculative but only disallowed on the ground that it was notional. Lastly, the reliance placed on the decision in **S. Vinodkumar** (supra) in the Revenue's favour would not by itself govern the issues arising herein. This is so as every decision is rendered in the context of the facts which arise before the authority for adjudication. Mere conclusion in favour of the Revenue in another case by itself would not entitle a party to have an identical relief in this case. In fact, if the Revenue was of the view that the facts in **S. Vinodkumar** (supra) are identical / similar to the present facts, then reliance would have been placed by the Revenue upon it at the hearing before the Tribunal. The impugned order does not indicate any such reliance. It appears that in **S. Vinodkumar** (supra), the Tribunal held the forward contract on facts before it to be speculative in nature in view of Section 43(5) of the Act. However, it appears that the decision of this court in **CIT vs. Badridas Gauridas (P) Ltd.**⁴ was not brought to the notice of the Tribunal when it rendered its decision in **S. Vinodkumar** (supra). In the above case, this court has held that forward contract in foreign exchange when incidental to carrying on business of cotton exporter and done to cover up losses on account of differences in foreign exchange valuations, would not be

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speculative activity but a business activity.

8. In the above view, the question of law, as formulated by the Revenue, does not give rise to any substantial of law. Thus, not entertained.

9. The appeal is dismissed. No order as to costs.

(S.C. GUPTE, J.)

(M. S. SANKLECHA, J.)