

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI**

Before Sh. N. K. Saini, AM And Sh. George George K., JM

ITA No. 2181/Del/2012 : Asstt. Year : 2007-08

Income Tax Officer, Ward 11(1), Revenues Building, I. P. Estate, New Delhi-110002	Vs	M/s Emperor International Ltd., E-18, Model Town, New Delhi-110009
(APPELLANT)		(RESPONDENT)

CO No. 241/Del/2012 : Asstt. Year : 2007-08

M/s Emperor International Ltd., E-18, Model Town, New Delhi-110009	Vs	Income Tax Officer, Ward 11(1), Revenues Building, I. P. Estate, New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No.AABCE2810J		

**Assessee by : Ms. Rano Jain, Sh. V. Mohan, CA
Revenue by : Smt. Parwinder Kaur, Sr. DR**

Date of Hearing : 17.03.2015	Date of Pronouncement : 27.05.2015
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ORDER

PER N.K. SAINI, A.M.

This appeal by the department and the Cross Objection by the assessee are directed against the order dated 22.02.2012 of the Id. CIT(A)-XIII, New Delhi.

2. First we will deal with the Departmental appeal in ITA No. 2181/Del/2012. The only effective ground raised in this appeal reads as under:

“1. On the facts & in the circumstances of the case Ld. CIT(A) has erred in holding, and consequently deleting the disallowance of loss made at Rs. 18,90,350/-, that transactions related to sale purchase of shares and derivatives/commodity trading were not speculative transactions and consequently allowing set-off of losses incurred from derivative trading against profit earned from other activities/business ignoring the fact that provisions of Explanation of Section 73 and Explanation 2 to Section 28 of the Act are specifically applicable to the Assessee’s case while provisions of Section 43(5) of the Act applies in general to all classes of Assesseees.”

3. Facts relating to the issue in brief are that the assessee filed Nil return of income after adjusting brought forward losses and paying tax u/s 115JB of the Income Tax Act, 1961 (hereinafter referred to as the Act) on 24.10.2007, which was processed u/s 143(1) of the Act. Later on, the case was selected for scrutiny. During the course of assessment proceedings, the AO noticed that the assessee was dealing in shares & securities, earning commission on the booking of flats and from commodity trading. The AO asked the assessee to explain as to why Explanation (5) to section 73 of the Act

should not be made applicable to the transactions in shares & securities. The assessee vide reply dated 15.10.2009 submitted that the transactions made by the assessee were of delivery based transaction and some of them were non-delivery based. As regards to the applicability of explanation (5) to section 73 of the Act, the assessee stated that the provisions of clause (c) and (d) to Sub-section (5) to section 73 of the Act provides that a contract entered into by a member of forward market or stock exchange in the course of transactions in the nature of jobbing or arbitrage to guard against loss, were not the transactions in speculative nature. It was also stated that the transactions in derivatives referred to in clause (ac) of section 2 of the securities contractor (Regularities) Act 1956, carried out in a recognized stock exchange were not speculative transactions. The AO observed that the assessee had incurred loss in derivative trading of Rs. 90,74,051/- and earned profit on commodity future transaction of Rs. 71,83,701/-. He further observed that the assessee was also doing delivery based sales/purchase, earning commission on sale of flats and under this head the assessee had shown profit of Rs. 21,15,903/-. The AO treated the transactions of derivative trading and commodity trading as speculative in nature, therefore, the loss on derivative trading of Rs. 90,74,051/- was allowed to be set off to the

extent of commodity profit of Rs. 71,83,701/- and the balance loss of Rs. 18,90,350/- was treated as speculative loss which was allowed to be carried forward and set off against speculative profit.

4. Being aggrieved the assessee carried the matter to the Id. CIT(A) and the submissions made as incorporated in para 10.2 of the impugned order were as under:

“10.2 Submission of the appellant

Your honor during the year under consideration the appellant was engaged in the business of dealing in shares and securities. The details of profits earned and the losses incurred are as follows:

<i>Profit from dealing in shares (delivery based)</i>	<i>4,59,450</i>
<i>Profit from dealing in shares (non delivery based)</i>	<i>1,56,378</i>
<i>Profit from Trading in Commodity Futures</i>	<i>74,72,122</i>
<i>Loss from Trading in Shares Futures</i>	<i>95,06,474</i>

The Id. AO while computing the income for the year under consideration by making his own calculations disallowed the loss of Rs.95,06,474/- incurred by the appellant on account of trading in share futures to be set off against the business income considering the same being speculative in nature. He also considered the profit of Rs.74,72,122/- on account of trading in commodity futures as speculative profit. The said action was done by invoking the provisions of section 73 of the I T Act.

In this respect it is submitted that the ld. AO has failed to understand the provision of the law and the recent judicial pronouncement in this respect and has erred in treating as loss incurred on derivatives as speculation loss as against the same being business loss.

Your honor will endorse that the fact that the loss of Rs. 95,06,474/- has been incurred on derivatives (share futures) is undisputed. Also the fact that there is a profit of Rs. 74,72,122/- on account of trading in commodity futures is undisputed. The only question before you is the allowability of the same as business profit/loss. In this respect your attention is drawn to the provisions of section 43(5) of the Act:-

43(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 scraps:

Provided that for the purposes of this clause-

(a) a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him; or

(b) a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations; or

(c) a contract entered into by a member of a forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member; [or]

(d) an eligible transaction in respect of trading in derivatives referred to in clause (ac) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognized stock exchange;

shall not be deemed to be a speculative transaction.

[Explanation.-For the purposes of this clause, the expressions-

(i) "eligible transaction" means any transaction,-

(A) carried out electronically on screen-based systems through a stock broker or sub-broker or such other intermediary registered under section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or the Depositories Act, 1996 (22 of 1996) and the rules, regulations or bye-laws made or directions issued under those Acts or by banks or mutual funds on a recognized stock exchange; and

(B) which is supported by a time stamped contract note issued by such stock broker or sub-broker or such other intermediary to every client indicating in the contract note the unique client identity number allotted under any Act referred to in sub-clause (A) and permanent account number allotted under this Act;

(ii) "recognized stock exchange" means a recognized 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 23 by the Central Government for this purpose;]

Further your attention is drawn to the CBDT circular dated 25.01.2006 wherein the National Stock Exchange and the

Bombay Stock Exchange have been recognized as the "recognized stock exchanges". The assessee has done the complete business through these exchanges only. Thus your honor the income from dealing in shares/commodities through derivatives i. e. futures and options is considered as business income/loss w.e.f 25.01.2006 as such the loss on derivatives should be treated as business loss and profit on commodity derivatives as business profit. In this respect your attention is drawn to the following judgments:

G. K Anand Bros. Buildwell (P) Ltd. vs ITO 34 SOT 439 (2009) wherein it was held

Whether loss arising in future and option transaction carried out in a recognized stock exchange is to be treated as a business loss and not as loss in speculation business- held yes-

The similar findings have been appreciated in the following case laws:

Seema Jain vs. ACIT 6 ITR (Trib) 488 (Del)

"profit or loss from derivative trading will not be speculative profit or loss, therefore, the same will be eligible to be set off against the business income carried out by the assessee"

RBK Securities (P) Ltd. vs. ITO 118 TTJ (Mum) 465

"Dealing in derivatives is a separate kind of transaction which does not involve any purchase and sale of shares and therefore loss on account of F&O transactions cannot be treated as speculative loss "

Dy. CIT vs. SSKI Investors Services (P) Ltd. (2008) 113 TTJ (Mumbai) 511

"Dealing in derivatives is a separate kind of transaction which does not involve any purchase and sale of shares and therefore loss on account of F & O transactions cannot be treated as speculative loss ".

Your honor the case laws quoted by the Id. AO relate to losses incurred on shares and securities and not on futures and options and thus are not applicable to the facts of the case of the appellant company.

In view of the above facts and the position of law, it is prayed that the additions made by the AO be deleted and such other relief be given which your honor may deem fit."

5. The Id. CIT(A) after considering the submissions of the assessee observed that the assessee had filed complete details and contract notes of the transactions done in derivative and commodity future before the AO as well as before him and that the action of the AO was contrary to the provision of section 43(5) clause (c) and (d) of the Act. According to him the loss on derivative trading was to be set off against the profit earned by the assessee from commodity futures and also commission earned from sale of flats and sale & purchase of shares. The Id. CIT(A) held that the AO was not justified in treating the transactions of derivative trading and commodity future as speculative, he directed the AO to allow the set off of loss incurred from derivative trading against the profit earned from commodity future, sale & purchase of

shares and commission earned on sale & purchase of land.

The reliance was placed on the following case laws:

- *Smt. Seema Jain Vs ACIT 6 ITR (TRIB) 488 (Del.)*
- *G.K. Anand Bros. Buildwell (P.) Ltd. Vs ITO, Ward-12(2), New Delhi (2009) 34 SOT 439 (Del.)*
- *R.B.K. Securities (P.) Ltd. Vs ITO 118 TTJ (Mum) 465*

6. Now the department is in appeal. The ld. DR strongly supported the assessment order dated 10.12.2009 and reiterated the observations made by the AO.

7. In his rival submissions the ld. Counsel for the assessee reiterated the submissions made before the authorities below and strongly supported the impugned order. It was further submitted that the speculative transaction is defined in section 43(5) of the Act to mean a transaction in which contract for purchase or sale of any commodity, including stock & shares is periodically or ultimately settled otherwise than by actual delivery or transfer of the commodity or scraps, thereafter, a proviso has been inserted to exclude certain transactions from the purview of the speculative transactions and clause (d) specifically provides that an eligible transaction in respect of trading in derivatives referred to in clause (ac) of section 2 of the Securities Contract (Regulation) Act, 1956 carried out in a recognized

Stock Exchange shall not be deemed to be a speculative transaction. Thus, this clause specifically excluded derivatives from the purview of section 43(5) of the Act. It was further stated that there is no clause in section 73 of the Act to override the provisions of clause (d) of section 43(5) of the Act which categorically provides that transaction in respect of trading in derivative shall not be deemed to be a speculative transaction. It was also submitted that the assessee had not incurred loss in the sale/purchase of shares and was doing trading in derivative which is different than the share as is evident from the definition given in the Securities Contract (Regulation) Act, 1956 and also under the Companies Act, thus, the share and derivatives are distinct items. Therefore, the explanation to section 73 of the Act being a deeming fiction cannot be extended to the derivatives. The reliance was placed on the following case laws:

- *CIT Vs Apollo Tyres Ltd. 255 ITR 271 (SC)*
- *R.B.K. Securities (P) Ltd. Vs ITO (2008) 118 TTJ (Mum) 465*
- *CIT Vs Intermetal Trade Ltd. (2006) 285 ITR 536*

8. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted fact that the assessee suffered a business loss in shares amounting to Rs.

95,06,474/- on derivatives which was treated by the AO as speculative in nature. The assessee also earned profit of Rs. 74,72,122/- on account of trading in commodity futures. The said profit was also considered by the AO as speculative in nature but without bringing any material on record as to how the same was speculative in nature. The assessee earned the profit relating to delivery based share trading, trading in commodities and earning commission on booking of flats. Profit earned from those activities by the assessee cannot be considered as speculative in nature. Now question arises as to whether the loss suffered by the assessee on derivative was to be treated as a speculative loss or to be set off against the regular business profit. To resolve this issue, it is relevant to discuss the provisions contained in explanation to clause (d) of Sub-section (5) to Section 43 of the Act which provides that eligible transaction in respect of trading in derivatives would not be deemed to be speculative transaction. The said provision read as under:

“43(5) Speculative transaction means a transaction in which a contract for the purchase or sale of any commodity, including stocks and share, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips:

(a).....

(b).....

(c).....

(d) an eligible transaction in respect of trading in derivatives referred to in clause (ac) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognized stock exchange;

(e)

Shall not be deemed to be a speculative transaction.

[Explanation 1] – For the purposes of [clause (d)], the expressions –

(i) “eligible transaction” means any transaction –

(A) carried out electronically on screen-based systems through a stock broker or sub-broker or such other intermediary registered under section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992) in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or the Securities and Exchange Board of India Act, 1992 or the Depositories Act, 1996 (22 of 1996) and the rules, regulations or bye-laws made or directions issued under those Acts or by banks or mutual funds on a recognized stock exchange; ;and

(B) which is supported by a time stamped contract note issued by such stock broker or sub-broker or such other intermediary to every client indicating in the contract note the unique client identity number allotted under any Act referred to in sub-clause (A) and permanent account number allotted under this Act;

(ii) “recognized stock exchange” means a recognized 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.”

9. In the present case, it is an admitted fact that the assessee was engaged in the business of dealing in shares & securities and have incurred loss from dealing in derivatives (shares futures). It is not the case of the AO that the share futures in which the assessee was dealing were not recorded in recognized Stock Exchange, the loss incurred by the assessee was also not disputed by the AO. We, therefore, by keeping in view the provisions contained in clause (d) to Sub-section (5) of Section 43 of the Act, are of the view that the Id. CIT(A) was fully justified in directing the AO for not treating the loss incurred by the assessee on derivatives and the profit earned if trading of the commodity as speculative in nature, For the aforesaid view, we are also fortified by the decision of the ITAT Mumbai Bench in the case of R.B.K. Securities (P) Ltd. Vs ITO reported in 118 TTJ 465 (supra).

10. In the Cross Objection, the assessee has raised the following grounds:

“1. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming an addition of Rs. 31,922/- made by AO invoking the provisions of Rule 8D under section 14A of the Act.

2. On the facts and circumstances of the case, the provisions of Section 73 of the Act are not applicable to the case of the assessee.

3. The assessee craves leave to add, amend or alter any of the grounds of cross objection.”

11. Ground No. 1 was not pressed and Ground No.2 is co-related with the grounds raised by the department in its appeal, Ground No. 3 is general in nature. Since we have dismissed the appeal of the department, therefore, the Ground No. 2 of the assessee in Cross Objection becomes infructuous. Accordingly, Cross Objection of the assessee is also dismissed.

12. In the result, appeal of the department as well as Cross Objection of the assessee is dismissed.

(Order Pronounced in the Court on 27/05/2015).

Sd/-
(George George K.)
JUDICIAL MEMBER

Dated: 27/05/2015

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR