

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

INCOME TAX APPEAL NO. 376 OF 2014

The Commissioner of Income Tax-5
Mumbai

.. Appellant

v/s.

M/s. Vinergy International Pvt. Ltd.

.. Respondent

Mr. Abhay Ahuja for the appellant
Mr. Satish Mody a/w Ms. Aasifa Khan for the respondent

**CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.**

DATED : 11th AUGUST, 2016.

PC.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 28th August, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2009-10.

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

“Whether on the facts and in the circumstances of the case and in law, the Tribunal is justified by allowing foreign exchange fluctuation loss of Rs.62.62 lakhs to set off against the taxable

income without considering the CBDT's instruction No.3 of 2010 dated 23.03.2010?"

3. The respondent assessee claimed an expenditure / loss of Rs.62.62 lakhs and Rs. 34.37 lakhs as gain on account of foreign exchange fluctuation related to purchase and sales transactions outstanding as on 31st March, 2009 in its Return filed for A.Y. 2009-10. The Assessing Officer did not allow the expenditure / loss of Rs.62.62 lakhs holding it to be a contingent liability while not disturbing the gain of Rs.34.37 lakhs offered for tax by the respondent assessee. In appeal, the CIT(A) upheld the order of the Assessing Officer.

4. On further appeal, the impugned order of the Tribunal has allowed the respondent assessee's appeal holding that the claim of expenditure of Rs.62.62 lakhs is permissible under Section 37 of the Act. The impugned order of the Tribunal placed reliance upon the decision of the Apex Court in *Commissioner of Income Tax Vs. Woodward Governor India (P) Ltd.* 312 ITR 254 to hold that where the loss suffered by an assessee due to fluctuation of foreign exchange as on the date of balance-sheet in respect of purchase and sales of goods (payment have to be made / received) is allowable as expenditure under Section 37(1) of the Act.

5. The grievance of the Revenue before us is that Instruction no. 3 of 2010 dated 31st March, 2010 issued by the CBDT in respect of loss on account of foreign exchange derivatives is subsequent to the Apex Court's decision in *Woodward Governor India (P) Ltd.* (supra) and was not considered by the Tribunal. This instruction according to the Revenue would govern the issue.

6. In the present facts, we find that the loss was not on account of derivatives but are in fact losses and gains in foreign exchange relating to the purchase and sales transactions i.e. creditors and debtors outstanding as on 31st March, 2010. Therefore, the Instruction no.3 of 2010 issued by CBDT would have no application to the facts of the present case. In fact, the issue arising herein would be covered by the principles laid down sby the Apex Court in *Woodward Governor India (P) Ltd. (supra)*.

7. Accordingly, as the impugned order of Tribunal followed by the decision of the Apex Court in *Woodward Governor India (P) Ltd. (supra)* which governs the issue, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

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

(A.K. MENON, J.)

(M.S. SANKLECHA, J.)

Bombay High Court

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एफ', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI

सर्वश्री आर.एस. स्याल, लेखा सदस्य एवं संजय गर्ग, न्यायिक सदस्य, के समक्ष ।

Before Shri R.S.Syal, AM and Shri Sanjay Garg, JM

ITA No.3494/Mum/2012 : Asst.Year 2009-2010

M/s.Vinery International Private Limited Urmi Chambers, 3 rd Floor Apsara Complex, Dr.D.B.Marg Grant Road (East), Mumbai – 400 007 PAN : AAACS5473J.	बनाम/ Vs.	The Addl.Commissioner of Income-tax Range 5(3) Mumbai.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से /Appellant by : **Shri Satish Mody**

प्रत्यर्थी की ओर से /Respondent by : **Shri C.P.Pathak**

सुनवाई की तारीख / Date of Hearing : 22.08.2013	घोषणा की तारीख / Date of Pronouncement : 28.08.2013
---	--

आदेश / O R D E R

Per R.S.Syal (AM) :

This appeal by the assessee arises out of the order passed by the Commissioner of Income-tax (Appeals) on 19.03.2012 in relation to the assessment year 2009-2010.

2. First ground and the additional ground raised by the assessee are against the confirmation of the action of the Assessing Officer in assessing loss of ₹1,99,98,637 as speculation loss u/s 43(5) as against assessee's claim of non-speculation loss.

3. Briefly stated the facts of this ground are that the assessee claimed deduction for loss of ₹1.99 crore from hedging in crude oil.

On being called upon to explain as to why this loss should not be treated as speculation loss, the assessee furnished submissions which have been reproduced on pages 2 onwards of the order. The assessee's claim that the loss from hedging is not a speculative loss as per proviso (a) to section 43(5), was not accepted by the Assessing Officer. He in turn applied proviso (d) to section 43(5) to negative the assessee's contention by holding that transactions in respect of trading in derivatives which have not deemed to be speculative transaction, must be carried out through a recognized stock exchange. Since MCX came to be notified as recognized stock exchange for the purpose of section 43(5) from 22.05.2009, the Assessing Officer held that the loss could not be treated as speculative. No relief was allowed in the first appeal.

4. We have heard the rival submissions and perused the relevant material on record. At the very outset the learned Counsel for the assessee placed on record copy of the order passed by the Tribunal in ACIT v. Arnav Akshay Mehta (ITA No.2742/Mum/2011) dated 12.09.2012 in which it has been held that the assessee's derivative trading through MCX stock exchange in the assessment year 2007-2008 is non-speculative as the recognition by the Central Government of the stock exchange from a later date will not debar the transaction as speculation after 01.04.2006. It is noticed that the only issue taken by the authorities below for not accepting the applicability of clause (d) of section 43(5) is recognition of MCX stock exchange during the period relevant to the assessment year under consideration. Apart

from that the Assessing Officer did not consider the other ingredients of clause (d) of section 43(5). In our considered opinion, the ends of justice would meet adequately if the impugned order is set aside and the matter is restored to the file of A.O. We order accordingly and direct him to decide this issue afresh as per law in the light of the afore-noted Tribunal order. We want to make it clear that the issue is left open to be decided by the Assessing Officer. The applicability of the Tribunal order in the case of Arnav Akshay Mehta should be considered by the Assessing Officer as per law and facts of the instant case. He will also deal with the assessee's contention on the applicability of proviso (a) to section 43(5) if the case is found to be falling in proviso (d) to section 43(5). Without prejudice ground taken by the assessee about the direction to the Assessing Officer to allow set off of the alleged speculation loss against profit arising to the assessee in similar transaction in subsequent year, is clearly not acceptable because firstly we have not upheld the view of the Revenue in treating the loss of ₹1.99 crore as speculation and secondly subsequent assessment year is not before us.

5. The only other ground is against the disallowance of ₹62,62,090 on account of exchange rate fluctuation. The facts apropos this ground are that the assessee claimed deduction of ₹62.62 lakh as foreign exchange fluctuation loss. On being called upon to justify the deduction, the assessee stated that the purchase and sale transactions outstanding as on 31.03.2009 have been recognized at the rate prevailing on such date at ₹50.95 per dollar and thus the amount of

₹62.62 lakh represents loss on account of fluctuation in foreign exchange. The Assessing Officer treated this amount as contingent loss and did not allow any deduction. No relief was allowed in the first appeal.

6. After considering the rival submissions and perusing the relevant material on record, we find it as an admitted position that the assessee computed loss of ₹62.62 lakh by valuing outstanding purchase / loss at the rate of dollar prevailing as on 31.3.2009 vis-à-vis the rate at which the transactions were recorded during the year. The Hon'ble Supreme Court in the case of *CIT v. Woodward Governor [(2009) 312 ITR 254 (SC)]* has held that loss suffered by the assessee in respect of fluctuation in the rate of foreign exchange as on the date of the balance sheet is an item of expenditure u/s 37(1) in the year of approval. It is relevant to note that apart from claiming deduction for ₹62.62 lakh, the assessee offered income of ₹34.37 lakh in respect of gain on foreign exchange fluctuation with reference to the rate of purchase and sale transaction entered during the year, which has been duly accepted as taxable by the authorities below. In such a situation and respectfully following the precedent rendered by the Hon'ble Supreme Court, we are of the considered opinion that the assessee deserves deduction of ₹62.62 lakh. Before parting with this ground we would like to mention that the learned CIT(A) has made certain observations which are not relevant to this case. Firstly in para 6.2.2, he mentioned that the assessee is engaged in the business of manufacture and export of diamonds and in respect of export of

diamonds, the assessee has entered into forward contract in respect of foreign exchange to be received as a result of export. Contrary to it the assessee is not engaged in the business of manufacture of export of diamonds, but in trading industrial chemicals. Further the learned CIT(A) has considered this loss as arising in respect of speculative transactions which fact is wrong. This deduction was claimed with reference to the actual purchase and sale transaction entered into by the assessee during the year in question. For the foregoing reasons, we are satisfied that the assessee deserves to succeed on this issue. We order accordingly. This ground is allowed.

7. परिणामतः अपीलें आंशिक स्वीकृत की जाती है । In the result, the appeal is partly allowed.

Order pronounced on this 28th day of August, 2013.

आदेश की घोषणा दिनांक: को की गई ।

Sd/-

(Sanjay Garg)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(R.S.Syal)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 28th August, 2013.

Devdas*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A) – 9, Mumbai.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER.

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
<http://www.itatonline.org>