

**IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, KOLKATA**

**Before**

**Shri Sanjay Garg, Judicial Member**

**&**

**Dr. Manish Borad, Accountant Member**

**I.T.A. No.285/KOL/2023**

**Assessment Years: 2012-13**

DCIT, Circle-12(1), Kolkata	<b>Vs.</b>	Delight Suppliers Pvt. Ltd. 145, Rashbehari Avenue, Sarat Bose Road, Kolkata-700029. (PAN: AABCD8542L)
<b>(Appellant)</b>		<b>(Respondent)</b>

**Appearances by:**

*Shri Raman Garg, Addl. CIT, DR appeared for Appellant.*

*Shri Siddharth Agarwal, Advocate appeared for Respondent.*

Date of concluding the hearing : 17.01.2024

Date of pronouncing the order : 26.02.2024

**ORDER**

**Per Manish Borad, Accountant Member:**

This appeal filed by the revenue pertaining to the Assessment Year (in short “AY”) 2012-13 is directed against the order passed u/s 250 of the Income Tax Act, 1961 in short the “Act”) by ld. Commissioner of Income-tax (Appeals), Kolkata-20 [in short ld. “CIT(A)”] dated 17.01.2023 arising out of the assessment order passed u/s 143(3) of the Act by Ld. DCIT, Circle-12(1), Kolkata.

2. Revenue has raised following grounds of appeal:

*“1. Ld. CIT(A) erred in deleting the addition of Rs. 1,54,38,794/- on account of bogus loss on currency derivatives, ignoring the facts that A.O. has made the addition on the basis of statement of Sachet Saraf, Director of M/s. Man Gold Vanijya Pvt. Ltd. which is supported by corroborative evidences, during recording of his statement by Investigation Wing.*

*2. Ld. CIT(A) erred in deleting the addition of Rs. 1,54,38,794/- on account of bogus loss on currency derivatives, ignoring the fact that assessee had paid most of the losses incurred to the broker in the next financial year, the delay in*

*the period of settlement raises question about the genuineness of the transactions.*

*3. Whether the CIT(A) erred in holding the transaction to be genuine only on the basis of the fact that transactions were through bank and carried out at MCX Stock Exchange ignoring the fact these evidences do not make a non-genuine transaction genuine.*

*4. Whether on the facts and circumstances of the case, Ld. CIT(A) has erred in deleting the income under the head capital gains to the tune of Rs. 15,08,720/- and allowing the assessee's claim of safe harbour rule of 5% variation between stamp duty value and sale consideration for the A Y 2012-13 under 3 proviso of section 50C of the IT Act, 1961 when the 3 proviso of section 50C of the IT Act, 1961 and explanatory notes to Finance Act, 2018 clearly mentions that the amendment would be effective from 01.04.2019.*

*The appellant craves leave to make any addition, alteration and modification, abrogation etc. of ground or grounds on or before or during the course of hearing of the appeal."*

3. Facts in brief are that assessee is a Private Limited company engaged in real estate business. Nil income has been declared in the e-return for AY 2012-13 furnished on 29.09.2012. The case selected for scrutiny followed by notice u/s. 143(2) issued on 10.08.2013 and the same was served upon the assessee company. When information were called for by the Ld. AO, which were duly complied with. Ld. AO completed the assessment after disallowing the claim of loss from Dollar trading amounting to Rs.1,54,38,794/-, disallowance on account of difference of capital gain u/s. 50C of the Act at Rs.15,08,720/-. Income assessed at Rs.54,73,369/- under normal provisions and at Rs.46,09,966/- under sec. 115JB of the Act. Aggrieved, revenue is in appeal before this Tribunal.

4. Ld. DR vehemently supported the orders of lower authorities.

4. On the other hand, the Ld. Counsel for the assessee vehemently argued placing reliance on the order of the Ld. CIT(A) referring to the paper book containing 36 pages filed on 04.08.2023 and also placing reliance on various decisions appearing in the case law paper book contained 26 pages.

5. We have heard the rival submissions and carefully perused the records placed on record. The first issue raised by the revenue is regarding deletion of addition of Rs.1,54,38,794/- made by the AO on account of bogus loss on currency derivative. There was a search and seizure action carried out on 22.03.2013 at the premises of Mari gold Vanijya Pvt. Ltd. Mr. Sachet Saraf, director of the company was alleged to be engaged in providing accommodation entry of bogus loss in currency derivatives and it was informed by the directorate that Mari Gold Vanijya Pvt. Ltd. is a company registered as a commodity broker and is listed with MCX. During the period 16.03.2012 to 20.03.2012 suffered a loss of Rs.1,54,38,794/-. The assessee booked the said loss partly during the year under consideration and remaining in the subsequent period. Revenue has alleged that the said loss is a bogus loss. We further notice that Ld. CIT(A) has dealt with this issue by observing as follows:

*“3.3 I have carefully considered the facts of the case and submission of the appellant. Assessee has indulged in currency derivative trading at MCX Stock Exchange. All the transactions have been carried out at the MCX Stock Exchange platform and even the AO has in this regard. On the basis of information received from Investigation Wing, AO has concluded that the transactions through M/s. Marigold, Vanijya Pvt. Ltd. were manipulated and not genuine. However, subsequently, the Director of the said company, Sri Sachet Sara] who had given this statement during proceedings u/s.132, had retracted his statement. AO has not carried out any further investigation in this matter although he has pointed out some issues relating to some schedule of payments made by the assessee company to M/s. Marigold Vanijya Pvt. However, these issues are not sufficient in itself to draw any adverse view regarding the transactions. Assessee has also raised the issue regarding principles of natural Justice and has pointed out that neither the statement of Sri Sachet Saraf was given to the assessee nor opportunity of cross-examination was provided, despite repetitive requests in this regard. Appellant has also cited a number of decisions of the Kolkata, ITAT which have held the transactions in currency derivatives through M/s. Marigold Vanijya Pvt. Ltd. to be genuine, under the same facts as those of the assessee company. In these decisions, ITAT has observed that additions have been made only on the basis of the statement of Sri Sachet Saraf who has later retracted his statement. There was no corroborative evidence to show that transactions in currency derivative trading were manipulated. Hence, additions have been deleted and transactions with M/s. Marigold Vanijya Pvt. Ltd. have been held to be genuine.*”

*Under the circumstances, as discussed above and respectfully following the decisions of the Hon'ble Kolkata ITAT, as cited by the appellant, AO is directed to delete the addition of Rs.1,54,38,794/- and to allow the loss claimed by the assessee."*

6. From perusal of the above finding of the Ld. CIT(A) and considering the records placed in the paper book, we note that the alleged transaction was carried out on the MCX Gold Exchange platform and Ld. AO has not found any discrepancy in this regard. Further, we find that the assessee was not provided any opportunity of cross examining Mr. S. Saraf. The impugned addition has been made only on the basis of the statement given by Shri S. Saraf but apart from that no corroborative evidence has been placed on record by the revenue authorities to show that the transaction is manipulated. We, therefore, under the given facts and circumstances of the case find no infirmity in the order of Ld. CIT(A). Ground nos. 1, 2 and 3 raised by the revenue are dismissed.

7. Next issue raised in ground no. 4 is the addition under the head capital gain to the tune of Rs.15,08,720/-. Facts involved in this issue are that the assessee sold land and building to M/s. Intrasoft Technological Ltd. at a sale consideration of Rs.11,51,08,600/-. Ld. AO noticed that the sale value adopted by the Stamp Valuation Authority is Rs.13,42,16,432/-. The assessee is the one fourth owner of the property and, therefore, the difference in the value of stamp valuation authority and disclosed in the sale deed amounted to Rs.47,76,958/- (1/4<sup>th</sup> share) and after giving benefit of indexed cost and considering the excess depreciation wrongly claimed, Ld. AO held that there is a short fall in the capital gain offered to tax by Rs.15,08,720/-. When the matter was carried in appeal before the First Appellate Authority, assessee got relief as Ld. CIT(A) after considering the valuation report of the DVO and also considering the

safe harbour rule of 5% as per the 3<sup>rd</sup> proviso to section 50C of the Act allowed in favour of the assessee observing as under:

*“4.3 I have carefully considered the facts of the case and submission of the appellant. Valuation report of the OVO has been received after the assessment order was finalised. As per the valuation report, the estimated value of the property as on 31.01.2012 was Rs.12,07,89,700/-whereas assessee had declared the sale consideration of Rs.11,51,08,600/ as on 31.01.2012. Thus, the difference between the estimated value and the declared value was less than 5% of the declared value. As appellant in its submissions had claimed that safe harbour rule of 5%, as per the 3rd proviso to section SOC, would be applicable in its case in view of several judicial pronouncements, AO was asked to offer his comments on this" issue. Vide letter dated 28.11.2022, AO has submitted that 3rd proviso to section 50C was inserted by Finance Act, 2018 and it Was effective from 01.04.2019. AO has mentioned that there is no provision that this amendment would be applicable retrospectively, i.e. w.e.f 01.04.2003. AO has also drawn our attention to the Explanatory Notes to Finance Act, 2018 which clearly mentions, that the amendment would be effective from 01.04.2019. I have duly considered AO's objections in this regard. But the facts remains that there are several decisions including those of Kolkata ITAT, as mentioned by the appellant in its submissions, which have held the insertion of 3rd proviso to section 50C of the I. T. Act to be declaratory and curative in nature. It is held that this amendment is not a substantive amendment. Rather it is only a procedural amendment. Therefore, even when the statute does not specifically state so, such amendment are in the nature of retrospective amendment and these should be treated as effective from the date when 50C was introduced in the statute, i.e. w.e.f. 01.04.2003. As in the appellant's case, the difference between the estimated value and the declared value does not exceed 5% of the declared value, assessee is entitled for safe harbour rule of 5% as per 3rd proviso to section 50C, as held in various judicial decisions, as mentioned in the preceding paras.*

*Coming to the addition in respect of depreciation, I agree with appellant's submission that once the safe harbour rule of 5% is held to be applicable in appellant's case, no addition could be made by invoking the provisions of section 50C. Consequently, assessee's computation in respect of capital, gains would be acceptable and consequently there will be no occasion to disturb the WDV in respect of buildings. This would also imply that depreciation worked out as per remaining WDV in the depreciation chart would be same as declared by the assessee. Hence, addition in respect of excess claim of depreciation is not sustainable.*

*In view of the above discussion, addition of Rs.15,08,720/- under the head 'capital gains' is deleted.”*

8. On perusal of the above finding of the Ld. CIT(A) and also considering the fact that Ld. DR failed to controvert the finding of the Ld. CIT(A) by placing any contrary material on record and, therefore, since the Departmental Valuation officer's report (DVO) was not received before the conclusion of assessment proceeding, ld. AO

adopted the valuation as per the stamp valuation authority. However, Ld. CIT(A) was justified in adopting the valuation given by the DVO and has rightly considered the safe harbour rule of 5% as per third proviso to section 50C of the Act and thus, no interference is call for in the finding of Ld. CIT(A). Ground No. 4 raised by the Revenue is dismissed.

9. In the result, the appeal of the revenue is dismissed.

Order is pronounced in the open court on 26.02.2024.

Sd/-

[Sanjay Garg]  
Judicial Member

Sd/-

[Manish Borad]  
Accountant Member

Dated: 26<sup>th</sup> February, 2024

*J.D. Sr. PS.*

*Copy of the order forwarded to:*

1. **Appellant – DCIT, Circle-12(1), Kolkata.**
2. **Respondent – M/s. Delight Suppliers Pvt. Ltd., 145, Rashbehari Avenue, Sarat Bose Road, Kolkata-700029.**
3. CIT(A), Kolkata-20
4. CIT
5. Departmental Representative
6. Guard File.

*True copy*

By order

Assistant Registrar  
ITAT, Kolkata Benches  
Kolkata