



**IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH "A", LUCKNOW**

**BEFORE SHRI. A. D. JAIN, VICE PRESIDENT
AND SHRI T. S. KAPOOR, ACCOUNTANT MEMBER**

ITA No.40/LKW/2020
Assessment Year:2015-16

Ramesh Verma C/o Verma Ultrasound & CT Scan Hospital Crossing Bahrain	v.	The ACIT Gonda
TAN/PAN:ABGPV8227K		
(Appellant)		(Respondent)

Appellant by:	Shri Ashok Seth, C.A.
Respondent by:	Shri Harish Gidwani, D.R.
Date of hearing:	08 03 2022
Date of pronouncement:	18 05 2022

ORDER

PER A.D. JAIN, V.P.:

This is assessee's appeal against the order of the ld. CIT(A)-1, Lucknow, dated 15.11.2019 for assessment year 2015-16, raising the following Grounds of Appeal:

1. That the Income Returned should have been accepted.
2. That Learned Lower Court erred in facts and legal aspects of the case in going beyond the scope of limited scrutiny, hence the order passed is liable to be quashed.
3. That the Learned Lower Court erred in facts and legal aspects of the case in not allowing loss incurred in Derivative Business.
4. That the loss in derivative business was non-speculative hence Learned Lower court erred in not allowing the same against other business income.

5. That the order passed is against the merit, circumstances and legal aspects of the case.

2. The Assessing Officer made an addition of Rs.64,98,638/- by invoking the provisions of clause (e) of the first proviso to section 43 (5) of the I.T. Act, holding that derivatives trading in commodities is a kind of speculation in commodity trading business and that loss suffered in derivatives commodity trading can be set off only against its own head, and not against the business head.

3. By virtue of the impugned order, the ld. CIT(A) confirmed the addition. Aggrieved, the assessee is in further appeal.

4. Arguing Ground nos. 3 & 4, the ld. Counsel for the assessee has contended that the loss in commodity derivatives trading business was non-speculative and hence, the ld. CIT(A) has erred in confirming the action of the Assessing Officer in not setting off the same against other business income. It has been contended that the assessee is carrying on two businesses, one of medical derivatives and the other of dealing in the derivatives of commodities, shares and securities in recognised Stock Exchanges; that the profit and loss account filed had income and loss of both the businesses, though in the computation, the profit of medical derivatives and loss of derivatives was shown separately under the head of "Income from Business and Profession"; that all the documents/evidences for the loss incurred in the derivatives business, were filed with the authorities below; that in these evidences, the amount of commodity transaction tax paid was also mentioned; that the loss incurred in derivatives trading was non-speculative in terms of section 43(5) of the I.T. Act; that the assessee has dealt in

derivative transactions in a recognized Association and on all transactions, commodity transaction tax has been paid; and that all conditions of “eligible transaction” has been complied with. It has, accordingly, been prayed that the loss be allowed to be set off against the profits from the medical derivatives business.

5. The Ld. D.R., on the other hand, has placed strong reliance on the impugned order, contending that since the assessee had set off loss of speculative business with regular business, this set off was rightly not allowed by the Assessing Officer and this action of the Assessing Officer was correctly confirmed by the ld. CIT(A).

6. Heard. The issue is as to whether the ld. CIT(A) has correctly confirmed the addition of Rs.64,98,638/-, made by invoking the provisions of clause (e) of the first proviso to section 43(5) of the I.T. Act.

7. Section 43(5) and clause (e) of the first proviso thereto, as applicable to Assessment Year 2015-16, i.e., the year under consideration, read as follows:

‘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 scrips:

Provided that for the purposes of this clause—

(a).....

(b).....

(c).....

(d).....

(e) an eligible transaction in respect of trading in commodity derivatives carried out in a recognised association, which is chargeable to commodities transaction tax under Chapter VII of the Finance Act, 2013 (17 of 2013),

shall not be deemed to be a speculative transaction.’

8. Thus, clause (e) of the first proviso to section 43(5) of the I.T. Act, categorically provides that an ^①(eligible transaction) in respect of trading in ^②(commodity derivatives) carried out in a ^③(recognised Association), which is chargeable to ^④(commodities transaction tax), shall not be deemed to be a speculative transaction.

9. Now, in order not to be deemed a speculative transaction, a transaction shall, as per clause (e) of the first proviso to section 43(5):

- (a) Be an eligible transaction
- (b) In respect of trading
- (c) In commodity derivatives
- (d) Carried out in a recognized association
- (e) Chargeable to commodities transaction tax under Chapter VII of the Finance Act, 2013.

10. Let us see if the assessee fulfills all the conditions prescribed by section 43(5) first proviso (e).

11.1 Explanation 2(ii) to clause (e) of the first proviso defines “eligible transaction” as follows:

"eligible transaction" means any transaction,—

- (A) carried out electronically on screen-based systems through member or intermediary, recognized under the bye-laws, rules and regulations of the recognised association for trading in commodity derivative in accordance with the provisions of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) and the rules, regulations or bye-laws made or direction issued under that Act on a recognised association; and*
- (B) which is supported by a time stamped the contract note issued by such member or intermediary to every client indicating in the contract note, the unique client identity number allotted under the Act, rules, regulations or bye-*

laws referred to in sub-clause (4), unique trade number and permanent account number this Act;

11.2 Neither the Assessing Officer, nor the Id. CIT(A) has disputed the assessee having fulfilled all the above conditions of an eligible transaction. The trading in commodity derivatives was carried out by the assessee on recognised Associations. As per reply dated 21.12.2017 (APB 7 – 12), filed by the assessee before the Assessing Officer, in response to notice dated 15.12.2017, issued under section 143(3), the documents confirming the business in trading of derivatives of Commodity, Currency and Shares had already been filed before the Assessing Officer by the assessee along with reply dated to 21.2.2017, by way of confirmation of M/s SMC Global Securities Ltd., for derivatives trading in commodity market, and M/s Wealth Mantra Commodities Private Limited for trading in Commodity and Currency derivatives. The loss shown in these confirmations was stated to be matching with the loss shown in the profit and loss account. It was also stated that in these confirmations filed, the amount of commodity transaction tax paid also stood mentioned. Similar was the reply dated 24.10.2019 (APB 17 – 21) filed by the assessee before the Id. CIT(A). The Id. CIT(A), in paragraph 4.2 of the impugned order, has acknowledged that “confirmations of M/s SMC Global Securities Ltd. for derivatives trading in commodity markets, M/s Wealth Mantra Commodities Private Limited for dealing in commodity and currency derivatives have been filed.”

11.3 In view of the above, the transactions entered into by the assessee are eligible transactions.

12. It also nowhere stands disputed by the authorities below that the transactions in question were in respect of trading in

commodity derivatives, carried out in recognised Association/s, chargeable to commodities transaction tax. Therefore, evidently, all the requirements of clause (e) to the first proviso to section 43(5) stand squarely met.

13. From the above, indubitably, the transactions entered into by the assessee, in keeping with the specific requirements of clause (e) of the first proviso to section 43(5), cannot at all be deemed to be speculative transactions. In this regard, unsustainably, the authorities below have gone at a total tangent from the requirements of law. As for the Assessing Officer, he states that the assessee does business in non-agricultural trading, for which, he had not submitted any expertise. Now, this is nowhere the requirement of clause (e) of the first proviso to section 43(5), as discussed above. There is no bar of expertise requiring trading in commodity derivatives, if the assessee, being a Doctor, practices in Radiology. It is also not correct to state, as has been done by the Assessing Officer, that the assessee is trading in commodities rather than in commodity derivatives, which is speculative in nature. As per the details of loss from derivatives business incurred by the assessee, such derivatives were with regard to Crude oil, Nickel, etc., and Currency derivatives. The confirmations from the recognised Associations were filed, as previously noted. Nowhere have the authorities below denied that the commodity derivatives are commodity derivatives as prescribed under Chapter VII of the Finance Act, 2013. In this regard, clause (i) of Explanation 2 to section 43(5) specifically states that for the purposes of clause (e) of the first proviso of section 43(5), the expression 'commodity derivatives' shall have the meaning as assigned to it in Chapter VII of the Finance Act, 2013.

14. In the impugned order, the Id. CIT(A), without considering this aspect of the matter, has confirmed the Assessing Officer's observations, holding that the assessee could do two businesses, but the accounts should have been maintained separately; that the assessee has wrongly set off loss of speculative business with regular business; and that the assessee does not have the expertise of doing trading in commodities.

15. Firstly, no case of intermingling of expenses stands made out. The loss from trading in commodity derivatives has been identified to the last rupee. The issue is as to whether such loss can be set off against other business loss. Next, as discussed herein above, in keeping with clause (e) of the first proviso to section 43(5), the loss incurred is not a speculative loss.

16. Now, coming to the issue as to whether the loss from trading in commodity derivatives, which, as above, is not a speculative loss, has rightly been set off by the assessee against regular business profits from medical derivatives business.

17. As per section 70 (1) of the I.T. Act, where the net result for any Assessment Year in respect of any source falling under any head of income, other than "Capital Gains", is a loss, the assessee shall be entitled to have the amount of such loss set off against his income from any other source under the same head.

18. So, according to section 70(1) of the I.T. Act, loss from any source under any head of income can be set off against income from any other source under the same head.

19. Then, section 73 (1) states thus:

"Any loss, computed in respect of a speculation business carried on by the assessee, shall not be set off except against profits and gains, if any, of another speculation business."

20. Reading clause (e) of the first proviso to section 43(5), and sections 70(1) and 73(1) of the I.T. Act together, it emerges that in the assessee's case, since a derivatives commodity trading transaction is not a speculative transaction, loss arising therefrom can very well be set off against the profit of the medical derivatives business of the assessee. Rather, it is only against such business profit that the business loss from the derivatives commodity trading can be set off.

21. Clause (e) of the first proviso to section 43(5) of the I.T. Act was inserted by the Finance Act, 2013, w.e.f. 1.4.2014. The assessment year under consideration is 2015 – 16. Thus, this provision is squarely applicable to the assessee's case.

22. None of the case laws relied on by the ld. CIT(A) is applicable to the present case, since they do not relate to clause (e) of the first proviso to section 43(5) of the I.T. Act.

23. In view of the above, the grievance of the assessee is found to be justified and is accepted as such. The Grounds raised are, hence, accepted. The addition made by the Assessing Officer, as confirmed by the ld. CIT(A), is cancelled.

24. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 18/05/2022.

Sd/-
[T. S. KAPOOR]
ACCOUNTANT MEMBER

Sd/-
[A. D. JAIN]
VICE PRESIDENT

DATED:18/05/2022

JJ:

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

Assistant Registrar