

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ, अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER

ITA.No.1378/Ahd/2013

निर्धारण वर्ष/Asstt.Year : 2008-2009

Shri Dron Sureshkumar Rao 139, Ajit Nagar Society Productivity Road Akota, Baroda 390 001. PAN : AIRPR 2176 D	Vs	ITO, Ward-2(4) Baroda.
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Tushar Hemani, AR
Revenue by :	Ms.Sonia Kumar, SR.DR

सुनवाई की तारीख/Date of Hearing : 10/10/2017
घोषणा की तारीख /Date of Pronouncement: 04/12/2017

आदेश/O R D E R

Assessee is in appeal before the Tribunal against the order of the Id.CIT(A)-II, Baroda dated 18.1.2013 passed for the Asstt.Year 2008-09.

2. In the grounds of appeal, assessee has pleaded that the Id.CIT(A) has erred in not allowing set off of loss of Rs.3,19,071/- being loss on trading of shares/securities against other business income.

3. Brief facts of the case are that the assessee has started trading activities in shares w.e.f. 14.11.2007. He has filed copy of bank statement and ledger account of M/s.Marfatia Stock Brokings P.Ltd. The Id.AO has treated the loss shown by the assessee as speculative loss and observed that since the assessee

has no speculative profit, therefore, he has neither entitled to claim set off nor to claim carry forward.

4. Dissatisfied with this finding of the Id.AO, the assessee carried the matter in appeal and submitted before the Id.CIT(A) the following explanation:

*"5.2. SUBMISSION DURING APPELLATE PROCEEDINGS:
5.2.1 In appeal the learned Authorized Representative submitted that -*

"As explained, the appellant has, in the course of assessment proceedings, submitted the details of transactions in shares, F&O carried out through the Broker Marfaria Share Brokings Pvt. Ltd, The computation of loss of Rs.3,19,071/- based on the Profit & Loss Account has been produced in the Assessment order itself and is reproduced below:

<i>Particulars</i>	<i>Amt. Rs. (Or)</i>	<i>Particulars</i>	<i>Amt Rs. (Cr)</i>
<i>Purchases and expenses</i>	<i>7,57,539</i>	<i>Sales</i>	<i>2,84,438</i>
		<i>Closing Stock</i>	<i>1,54,030</i>
		<i>Loss</i>	<i>3,19,071</i>
<i>Total</i>	<i>7,57,5311</i>	<i>-Total</i>	<i>7,57,539</i>

The appellant has claimed the set off of such loss against the other business income for the year under consideration as per the IT Act, 1961 which is denied by the Ld. A.O. on the ground that the appellant had entered into speculation business (in F&O) and the loss out of the speculation business can be set off against speculation income only. Another plea taken by the Ld. AO is that the same has not been declared in the return of income.

It is submitted that the appellant had started the trading activities w.e.f. 14.11.2007 as confirmed by the Ld. AO in the

order itself. On going through the P&L account mentioned above, it can be seen that during the year under consideration appellant has purchased shares amounting to Rs.7,57,539/- whereas sale of shares comes to Rs. 2,84,438/-. As the said business has been started during the year under consideration, there is no opening stock.

It is submitted that from A.Y. 2006-07, transactions in F&O are outside the purview of 'speculative transaction' as per section 43(5) (d). Hence, any income/loss therefrom is to be treated as business income/loss. Trading in shares is again assessable as business income. Another objection taken by the Ld. AO is that capital invested in business amounting to Rs.4,73,101 remained unexplained. The appellant has made payments of Rs.4,70,300 from the ICICI Bank account to Marfatia Stock Brokings P. Ltd. which has been admitted by the Ld. AO in the order itself.

Therefore, considering the above, it is requested the impugned loss be allowed to be set off against business income as per the provisions of the Act. The above losses, even though not disclosed in the return of income were duly claimed during the course of assessment proceedings, giving the full particulars thereof along with documentary evidence in support of the same. However, the Ld. AO has simply ignored these merely because these were not disclosed in the computation and return of income filed with the department. The main grouse is that the claim was not made in the return of income.

It is with respect submitted that the claim is not a new one or additional as the income in the case of the appellant is assessed in respect of the transactions carried out in the ICICI Bank not reported or declared. When all the transactions carried out to the undeclared / undisclosed account is being considered, the same is to be considered in totality and if some claims are found to be eligible, the same ought to be allowed. Reliance is placed on the following decisions wherein the ratio of the order of the Hon'ble Supreme Court in the case of Goetze India Ltd. 284 ITR 323 is examined:

- *Romeo International 221 CTR 491 (P&H)*
- *CIT vs. Mahavir Spinning Mills Ltd. 303 ITR 353 (P&H)*

- *Earesson Net Work Power India Pvt. Ltd. 19 DTR 441 (Mum.)*
- *Chicago Pneumatic India Limited 15 SOT 252 (Mum)*
- *MoserBaer95ITR148(AT)(Del.)*

Without prejudice to the above, it is with respect submitted that there may be restrictions with regard to additional claim, not made in the return of income, on the Ld. A.O. However, such restrictions do not apply to the appellate authorities as held by the Hon'ble Supreme Court in the case of Goetze referred above in para 4. Considering the availability of complete information on record, the claim may kindly be allowed."

5. Somehow, contention of the assessee did not find favour of the ld.CIT(A) and he confirmed the order of the AO. The ld.counsel for the assessee submits that loss from F&O carried out through recognized stock exchange cannot be treated as speculative transaction. He further contended that both the Revenue authorities have observed that the assessee failed to submit details, i.e. date-wise and scrip-wise summary of purchase and sale. The AO also observed that majority of credits in bank accounts were by cash deposits and no F&O sale realization is credited in this account. He pointed out that the assessee has made payment of Rs.4,70,300/- from ICICI Bank account to Marfatia Share Broking P.Ltd. which has not been disputed by the AO in the assessment order. There is no sale realization proceeds made in his account as the sale proceeds have been netted out with purchases. The sales proceeds were of Rs.2.84 lakhs as against purchases of Rs.7.57 lakhs. The net amount being Rs.4.73 lakhs, therefore, it requested that the balance being loss, allowed to be set off against business income. In support of his contention, he relied upon the orders of the ITAT in the case of Babubhai Ramanlal Patel Vs. DCIT, Ahmedabad, ITA No.1674/Ahd/2014 order dated 19.4.2017. He placed on record copy of the Tribunal's order. On the other hand, the ld.DR relied upon remand report of the AO reproduced by the ld.CIT(A) on page no.17 of the impugned order.

6. I have duly considered rival contentions and gone through the record. The Id.DR basically raised two arguments viz. these are speculative transaction, and therefore, loss accrued on speculative transaction cannot be set off against regular business income. He further contended that in the remand report, the AO has observed that the return was filed on 4.8.2008 and it was not filed before 31.7.2008. As far this date is concerned, I find that in the assessment order, the AO has observed that return was filed on 4.6.2008 and not 4.8.2008. The second aspect is whether the loss from F&O could be considered as speculative loss. This aspect has been considered by the Tribunal in the case of Babubhai Ramanlal Patel (supra) and following finding was recorded:

“4.2. We find that the loss from F&O business carried out through recognized stock exchange cannot be treated as speculative loss in view of the exceptions carried out under s.43(5) of the Act. As per clause(d) of first proviso to section 43(5) of the Act inserted by the Finance Act, 2005 with effect from 01/04/2006, trading in derivatives carried out through recognized stock exchange will not be deemed to be a speculative transaction for the purposes of section 43(5) of the Act. Thus, the loss arising from trading in derivatives ought to be treated as ordinary business loss. Thus, the restrictions applicable for eligibility of set off of loss of speculative nature will not apply to the loss arising from F&O transaction.”

7. Thus, F&O transaction carried out through recognized stock exchange cannot be treated as speculative transaction. Therefore, I allow appeal of the assessee and direct the AO to grant set off of this loss against business income.

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

Order pronounced in the Court on 4th December, 2017 at Ahmedabad.

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER

Ahmedabad; Dated 04/12/2017