IN THE INCOME TAX APPELLATE TRIBUNAL, 'B' BENCH MUMBAI

BEFORE: SHRI C.N. PRASAD, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER

ITA No.6321/Mum/2019
(**Assessment Year :2014-15**)

ITA No.6322/Mum/2019
(**Assessment Year :2016-17**)

DCIT-CC-8(1) Room No.656, 6th Floor Aayakar Bhavan M.K.Road, Mumbai Maharashtra-400 020	Vs.	M/s.Nirshilp Securities Pvt. Ltd., 301-308, 3rd Floor, Bhagwati House-A-19 Veera Desai Road Andheri (W) Mumbai – 400 058 Maharashtra
PAN/GIR No.AABCN4361M		
(Appellant)	..	**(Respondent)**

ITA No.6318/Mum/2019
(**Assessment Year :2014-15**)

DCIT-CC-8(1) Room No.656, 6th Floor Aayakar Bhavan M.K.Road, Mumbai Maharashtra-400 020	Vs.	M/s.Dolat Investment Ltd., 301-308, 3rd Floor, Bhagwati House-A-19 Veera Desai Road Andheri (W) Mumbai – 400 058 Maharashtra
PAN/GIR No.AABCN4361M		
(Appellant)	..	**(Respondent)**

Revenue by	Shri Rahul Raman
Assessee by	Shri Rajiv Khandelwal & Shri Vijay Mehta
Date of Hearing	**11/05/2021**
Date of Pronouncement	**21/06/2021**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

ITA No.6321/Mum/2019 (A.Y.2014-15)

This appeal in ITA No.6321/Mum/2019, for A.Y.2014-15 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-50, Mumbai in appeal No.CIT(A)-50/10023/2019-20 dated 16/07/2019 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 30/12/2016, 10/12/2018 & 28/12/2016 by the ld. Asst. Commissioner of Income Tax-10(3)(1) Mumbai (hereinafter referred to as ld. AO).

1.1 The ld DR before us stated that the appeal of the revenue for the Asst Year 2014-15 in the case of Nirshilp Securities Private Limited may be taken as the lead year in ITA No. 6321/Mum/2019 and the decision rendered thereon could be applied for other assessment years except variance in figures. The ld AR also fairly agreed for the said submission of the ld DR. Accordingly, the facts of Asst Year 2014-15 in the case of Nirshilp Securities Private Limited are taken up for adjudication and the decision rendered thereon would apply with equal force for other assessment years with respect to same assessee and also in the case of Dolat Investments Ltd in respect of identical issues, except with variance in figures.

2. The Ground No. 1 raised by the revenue is challenging the deletion of disallowance u/s 14A of the Act read with Rule 8D(2) of the Rules.

2.1. We have heard the rival submissions and perused the materials available on record. We find that the assessee had earned exempt income in the form of dividend to the tune of Rs 2,03,57,802 /- and had made suo moto disallowance u/s 14A of the Act amounting to Rs 20,35,780/-, being 10% of dividend income , while filing its return of income. The ld AO recomputed the disallowance u/s 14A of the Act by applying the computation mechanism provided in Rule 8D(2) of the Rules as under:-

Under Rule 8D(2) (i)	- Rs Nil
Under Rule 8D(2)(ii)	- Rs 20,91,302
Under Rule 8D(2)(iii)	- Rs 7,25,221
	Rs 28,16,523
Less: Disallowance by assessee	Rs 20,35,780
Disallowance u/s 14A	Rs 7,80,743

2.2. We find that the ld CITA had deleted the disallowance of interest made under Rule 8D(2)(ii) of the Rules on the ground that the assessee company is having sufficient interest free funds in its kitty. With regard to disallowance of indirect expenses under Rule 8D(2)(iii) of the Rules, the ld CITA held that since the disallowance already made by the assessee is much more than Rs 7,25,221/-, no further disallowance is warranted in the case. It is a fact on record that the assessee is having sufficient interest free funds in the form of share capital and reserves to the tune of Rs 218.14 crores as on 31.3.14 and Rs 250.02 crores as on 31.3.13 which is evident from the bare perusal of the financial statements for the respective period and that the same is much more than the investments made by the assessee. Hence by applying the ratio laid down by the Hon'ble Jurisdictional High Court in the case of HDFC Bank Ltd reported in 366 ITR 505 and of the Hon'ble Supreme Court in the case of

Reliance Industries Ltd reported in 410 ITR 466, we hold that no disallowance of interest need to be made under Rule 8D(2)(ii) of the Rules.

2.3. With regard to disallowance under Rule 8D(2)(iii) of the Rules, the ld AR argued that the disallowance already made by the assessee was much more than disallowance warranted under third limb of Rule 8D(2) of the Rules. We are inclined to agree with the same. Hence we direct the ld AO not to make any disallowance u/s 14A of the Act other than the suo moto disallowance already made by the assessee in the return of income, both under normal provisions of the Act as well as in the computation of book profits u/s 115JB of the Act. Accordingly, the Ground No. 1 raised by the revenue is dismissed.

3. The Ground Nos. 2 and 3 raised by the revenue are challenging the deletion of disallowance of business loss on account of NSEL and also treating the said loss as speculative loss.

3.1. We have heard the rival submissions and perused the materials available on record. It would be pertinent to understand the modus operandi of the functioning of National Spot Exchange Ltd (NSEL) together with its profile in brief. NSEL is a national-level institutionalised, electronic, transparent spot trading platform for commodity. It commenced "Live" trading on October 15, 2008. It was operational in 16 states in India, providing delivery-based spot trading in around 52 commodities. NSEL provided the following functions for trading opportunities :-

- Traders can trade and lock their returns

- Trader has to buy in near settlement contract and sell in far settlement contract simultaneously
- Price for both settlement available
- Exchange Provides counterparty guarantee risk
- No basis risk, No link with future contracts

3.1.1. The type of contracts stated above are loosely termed as 'paired contracts'.

3.2. We find that the assessee is a Private Limited Company engaged in the business of trading in shares, securities and commodities. We find that the assessee is a group concern of "DOLAT GROUP", also known as "SHAH FAMILY". The trading in shares, securities and commodities are carried out by the broking firms owned by the group namely,Nirpan Securities Pvt Ltd which is a broking firm registered under SEBI and is authorised to trade on National Stock Exchange in shares and securities. Another broking firm namely, Shailesh Shah Securities Pvt Ltd is authorised to trade on Bombay Stock Exchange. In respect of trading in commodities, Purvag Commodities Pvt Ltd and Jigar Commodities Pvt Ltd are authorised to trade on electronic platforms of several exchanges.

NSEL is a spot exchange incorporated as company under the provisions of the Companies Act, 1956. The NSEL is a national level, electronic spot trading platform for commodities with operations in 16 states in India and providing delivery based spot trading in around 52 commodities. It was an exchange for trading in commodities and carrying out its activities since 2007. NSEL was platform for automated trading system for conducting spot trading system in commodities. In or around September 2009, the NSEL for the first time introduced paired traders contracts, and from time to time the company issued ciruclars

regarding the commencement of spot trading in a particular commodity. These circulars would be issued in pairs, one of which would permit a short settlement cycle such as T+2 and the other of which would permit a longer settlement cycle such as T+25. The assessee company had purchased and sold commodities on the exchange platform of NSEL by trading in the paired trader's contracts offered by the NSEL through their broker M/s Purvag Commodities and Derivatives Pvt ltd, who is registered as a member with the NSEL with registration no. 10120. The transaction of purchase and sale of commodities was done by the broker-members on the electronic exchange platform of the NSEL. As is usually the norm in any electronic exchange, at the time of trading on the anonymous order driven trading system on the exchange, the buyer does not know the seller and in the same way the seller does not know the buyer. At the time of settlement of the contract, the same was settled through the exchange platform of the NSEL. Therefore, the assessee entered into the paired trader's contracts without actually knowing at the time of entering into the contract who the buyer/seller was at the other end.

3.2.1. As per the Bye-laws of the NSEL, all outstanding transactions in commodities are generally required to be for compulsory delivery at any one or more delivery points, and/or warehouses approved, certified and designated by the NSEL as per Bye-Law 4.20(a) thereon. The circulars issued by the NSEL at the time of commencement of trading in each commodity contained specific details on the quantity, quality, warehouse, etc. These Circulars together with the risk management practices set out by the NSEL in its Bye-laws, confirmed that the warehouses, quantity and quality of goods were under the complete administration and control of the NSEL.

3.2.2. Further, as per the Bye-laws of the NSEL, it acts as the legal counter party in respect of transactions executed on the NSEL platform in accordance with its Bye-law No. 5.26. In any event, the NSEL also guarantees the settlement of net financial obligation. When a client trades on the anonymous order driven trading system on the NSEL, the buyer does not know the seller and in the same way the seller does not know the buyer, and the NSEL guarantees the settlement of trade executed in compliance with the Bye-laws as per Bye- Law Nos. 7.9.1., 7.9.2 and 9.6. thereon.

3.2.3. On 31.7.2013, the NSEL issued a circular suspending trading in one day forward contracts and deferring settlement to 15 days, stating that there had been *'loss of trading interest in the market due to underlying uncertainties, which led to trade inequilibrium*'. The circular further went on to wrongly merge the delivery and settlement of the outstanding contracts and thereby defaulted on the amount owed to the assessee company.

3.3. METHOD OR MANNER OF SETTLEMENT FOR PAYMENT, EARLY PAYIN, PAYMENT, RECEIPTSAND BASIS OF CLAIMING LOSS BY THE ASSESSEE

There are different contracts available for different commodities on the exchange as follows :

T+2 days (Buy Contract) and T+25 days (Sell Contract)

T+3 days (Buy Contract) and T+36 days (Sell Contract)

T+5 days (Buy Contract) and T+30 days (Sell Contract)
The term 'days' means working days excluding Saturdays, Sundays and exchange holidays.

The different commodities available are Castor Seed, Castor Oil, Cotton wash Oil Cake, Paddy, etc.The Clients enter into contract of the above commodities. For example, a client enters into contract of Castor Seed for T+3 (Buy Contract) and T+36 (Sell Contract), then the client will have to pay the funds on T+3 days for its purchase obligation and client will receive funds on T+36 days for its sales obligation.However, since the sales bill is issued on T+5 days by the clients and amount is received in T+36 days, the sales obligation will be shown as receivables in between T+5 and T+36 days.

3.3.1. The Exchange issues Delivery Allocation report for the purchase transaction. The warehouse receipts are in the custody of the exchange and the warehouse receipts will be tendered by NSEL against the commodity pay-in obligation of client. Further as per the Exchange delivery allocation letter, the said deliveries will be taken as early commodity pay in against the sale transaction.

3.3.2. At the time of suspending the trading and settlement, the following trader's contracts for which assessee company had given the commodities as "early pay in" under the T+10 contract and T+25 contract , were pending settlement :-

Description	Purchase Qty	Purchase Amount	Sale Qty	Sale Amount	Profit	Amount Receivable before MTM	MTM	Amount Receivable from NSEL after MTM
2101 NIRSHILP SECURITIES PVT. LTD.								

18/6/2013								
Total For CASTOILKLS	200	14,402,880.00						
Total For CASTOLKL30			200	14,657,068.00		14,657,068.00	2,932.00	14,660,000.00
19/6/2013								
Total For CASTOILKLS	200	14,362,872.00						
Total For CASTOLKL30			200	14,615,076.40		14,615,076.40	2923.60	14,618,000.00
20/6/2013								
Total For CASTOILKLS	200	14,322,864.00						
Total For CASTOLKL30			200	14,573,084.80		14,573,084.80	2915.2	14,576,000.00
21/6/2013								
25/6/2013								
Total For CASTOILKLS	340	24,314,862.00						
Total For CASTOLKL30			340	24,730,053.00		24,730,053.00	4,947.00	24,735,000.00
Total For CWOILKD12	1300	80,928,182.40						
Total For CWOILKDI25			1300	82,273,542.00		82,273,542.00	16,458.00	82,290,000.00
26/6/2013								
Total For CASTOILKLS	400	28,745,748.00						
Total For CASTOLKL30			400	29,234,152.00		29,234,152.00	5,848.00	29,240,000.00
Total For CWOILKD12	800	49,569,912.00						
Total For CWOILKDI25			800	50,389,920.00		50,389,920.00	10,080.00	50,400,000.00
Total For PDY1121HR2	3000	5,148,279.45						
Total For PDYTRADHR2	9000	16,392,277.80						
Total For PDY1121HR25			3000	5,233,953.00		5,233,953.00	1,047.00	5,235,000.00
Total For PYTRADHR25			9000	16,664,666.40		16,664,666.40	3,333.60	16,668,000.00
27/6/2013								
Total For CASTOILKLS	400	28,885,776.00						
Total For CASTOLKL30			400	29,414,116.00		29,414,116.00	5,884.00	29,420,000.00
Total For CWOILKD12	1150	70,946,186.40						
Total For CWOILKDI25			1150	72,044,588.20		72,044,588.20	14,411.80	72,059,000.00
28/6/2013								
Total For CASTOILKLS	190	13,777,755.00						
Total For			190					

CASTOLKL30				14,017,295.98		14,017,295.98	2,804.02	14,020,100.00
Total For CWOILKD12	1450	89,018,800.20						
Total For CWOILKDI25			1450	90,476,401.10		90,476,401.10	18,098.90	90,494,500.00
1/7/2013								
Total For CWOILKD12	750	46,419,282.00						
Total For CWOILKDI25			750	47,165,565.00		47,165,565.00	9,435.00	47,175,000.00
2/7/2013								
Total For CASTOILKLS	100	7,189,437.60						
Total For CASTOLKL30			100	7,315,536.60		7,315,536.60	1,463.40	7,317,000.00
Total For CWOILKD12	1550	95,002,996.80						
Total For CWOILKDI25			1550	96,545,687.00		96,545,687.00	19,313.00	985,650.00
3/7/2013 Total For CASTOILKLS	470	33,508,300.32						
Total For CASTOLKL30			470	34,115,175.60		34,115,175.60	6,824.40	34,122,000.00
Total For CWOILKD12	1200	73,792,755.60						
Total For CWOILKDI25			1200	74,985,000.00		74,985,000.00	15,000.00	75,000,000.00
4/7/2013								
Total For CASTOILKLS	300	21,547,308.60						
Total For CASTOLKL30			300	21,955,608.00		21,955,608.00	4,392.00	21,960,000.00
Total For CWOILKD12	1300	80,001,997.20						
Total For CWOILKDI25			1300	81,233,750.00		81,233,750.00	16,250.00	81,250,000.00
Total For 04/07/2013	1600	101,549,305.80	1600	103,189,358.00	1,640,052.20			
5/7/2013								
Total For CASTOILKLS	390	28,085,616.00						
Total For CASTOLKL30			390	28,612,476.36		28,612,476.36	5,723.64	28,618,200.00
Total For CWOILKD12	700	43,198,638.00						
Total For CWOILKDI25			700	43,909,216.40		43,909,216.40	281,783.60	44,191,000.00
Total For 2101 NIRSHILP SECURITIES PVT. LTD.,	13495	490,556,016.59	13495	498,675,644.92	1,640,052.20	894,161,931.84	451,868.16	894,613,800.00

3.3.3. An independent auditor 'SGS' was appointed to ascertain the discrepancy of the stocks lying in the warehouse after the NSEL scam broke out in public. As per the SGS Audit Report of the NSEL warehouses, it was revealed that commodities of the stated quantity were not stored in the NSEL designated warehouse. In respect of all the above contracts, the assessee received Delivery Allocation Report according to which stock was in possession of NSEL warehouse though title of the goods was with the assessee. The assessee was given warehouse receipt after making payment for the purchase of commodities. Therefore, as stock of goods purchased was not found but following amounts would have been due and payable to assessee company by the NSEL on the various dates towards settlement of the trades had the goods were found in warehouse and sold by assessee in normal course of business. The details of scheduled payments for the sale transactions are as follows:-

Sr. No.	Scheduled Date of Settlement	Total Amount payable to us by the NSEL on settlement
1	31/7/2013	Rs.9,69,50,000/-
2	1/8/2013	Rs.8,69,21,000/-
3	2/8/2013	Rs.8,66,35,000/-
4	5/8/2013	Rs.13,76,69,500/-
5	6/8/2013	Rs.9,65,65,000/-
6	7/8/2013	Rs.9,97,35,000/-
7	8/8/2013	Rs.11,04,90,000/-
8	12/8/2013	Rs.7,36,11,000/-
9	13/8/2013	Rs.1,40,20,100/-
10	14/8/2013	Rs.73,17,000/-
11	16/8/2013	Rs.3,41,22,000/-
12	19/8/2013	Rs.2,19,60,000/-
13	20/8/2013	Rs.2,86,18,200/-
	Total	Rs.89,46,13,800/-

3.3.4. On 4.8.2013, the NSEL issued a press release proposing a settlement cycle whereby payment towards the settlement obligations to

trades/ investors through broker member was to be made in a staggered manner and stating that the NSEL is in possession of post dated cheques amounting to Rs 4900 crores against their settlement obligations. On 14.8.2013, the NSEL uploaded a circular setting out details in respect of the revised schedule for settlement of outstanding dues payable to the brokers. Pursuant to the scheduled payouts under the settlement schedule, the NSEL made payments towards settlement of the outstanding contracts and assessee's broker received the payments from the NSEL on various dates commencing from 20.8.2013 to 22.3.2014 totalling to Rs 5,56,00,000.68. Pursuant to the above receipts by the assessee from NSEL through its broker, the loss suffered by the assessee due to non-receipt of goods was Rs 87,93,32,350/- being cost of goods purchased and not delivered by NSEL.

3.3.5. It was clear from the SGS audit report that significant stock shortage has been found in some so-called NSEL 'accredited' warehouses relating to certain defaulters. It has been reported that SGS audit team was not even allowed inside the premises of the majority of the NSEL warehouses for audit and inspection in certain warehouses relating to certain defaulters.

3.3.6.The assessee filed a complaint before Economic Offence Wing (EOW) jointly with other traders explaining the fraud committed by NSEL by not having the requisite quantity and quality of commodities at its accredited warehouses. The assessee gave the details of payments made to NSEL for purchase of commodities and this fact was also mentioned in the compliant lodged with EOW and craved the indulgence of EOW to assist in recovery of the dues from NSEL.

3.3.7. The assessee also served legal notice on the NSEL for winding up of their Company under Section 434 of the Companies Act, 1956 in the capacity of one of the creditor. In response thereto, the assessee received a reply from the advocate of NSEL disowning their responsibility to make payment to the assessee. These details with supporting evidences were furnished before the lower authorities and are forming part of the records.

3.3.8. Since the NSEL acts as a counterparty to the transactions executed on its exchange platform and further stands as a guarantor for settlement of all the contracts traded on its platform , it was the legal obligation of the NSEL to settle the contracts. The NSEL has failed to pay the outstanding amounts under the contracts to the assessee company through its broker-member , due to which the assessee has suffered loss. Infact the NSEL has failed to honor / settle the contracts and for which the NSEL had issued allocation reports depicting the quantity and quality of specified commodities located in NSEL certified warehouses despite there being no commodities of stated quantity and quality at such NSEL certified warehouses. Since the assessee could not receive any sums from NSEL except the sum of Rs 556 lakhs as stated above, the assessee company sought to write off the remaining sum as a regular trading loss arising in the course of its business and claim as deduction in the return of income.

3.3.9. It was stated that the assessee company has been trading on platform of NSEL since Asst Year 2011-12 and had been accounting for transaction as purchase on receipt of details of purchase parties with their bills and same were substantiated with delivery report which identifies warehouse where stock is delivered by NSEL who hold on behalf of assessee. Thereafter on receipt of sale instructions from NSEL, sale bill is prepared for buyer and papers for early pay-in / delivery are submitted to

effect delivery and receive payment on time which generally after 30 days depending upon the nature of contract. This pattern was followed by the assessee month after month and year after year and assessee was in genuine belief that transactions referred above will be honored by NSEL in normal course of business. But assessee was taken by surprise when NSEL announced suspension of trade and thereafter it tried to merge the settlements. Assessee along with other similar traders , brokers of NSEL, so called investors in NSEL had gathered and formed a group to pursue the matter with NSEL but no physical stock stated to have been delivered to assessee and others was not traceable at warehouses which means that stock purchased has been lost and cost paid for the same has been reduced to zero. The non -availability of requisite stocks at NSEL warehouses was confirmed by SGS audit report. The assessee had accounted for stock on date of purchase for which delivery allocation report was received and when same was not found up till balance sheet date and in view of non-cooperation of NSEL, the stock purchased has been valued at NIL while preparing trading results of the year though amount received from NSEL in lieu of claim has been separately credited in books of accounts as operating income and offered to tax. Thus assessee suffered loss of an amount of Rs 87,93,32,350/- equal to cost of goods purchased and lost less amount recovered from NSEL.

4. This loss was sought to be disallowed by the ld AO on the following grounds :-

a) The value of stock which was purchased during the year was determined at Rs NIL by the assessee which is not possible, more especially when the assessee is fighting the case against NSEL for recovery of dues.

b) The transactions of purchase and sale through NSEL are speculative in nature. It is clear that there was no actual delivery of goods, the fact reiterated in the Hon'ble High Court order no. 1263 of 2014. The Act states that any transactions without actual delivery of goods is speculative in nature. Speculation is defined in section 43(5) of the Act and sub-section (e) thereon deals with treatment of commodity derivatives. As per Rule 6DDD of the Income Tax Rules, National Spot Exchange Limited is not a recognised stock exchange and thus the transaction carried out are speculative transactions. Thus as per section 73(2) of the Act, any losses carried out in a speculation business will be set off with speculation gains only of that year or it will be carried forward for the subsequent 4 assessment years. Thus the losses on transaction on NSEL will be speculation in nature and the same cannot be set off with normal business income.

c) The assessee has received the delivery allocation report from NSEL which could be considered as actual delivery of commodities and hence assessee is not justified in claiming the loss on account of irrecoverability of dues from NSEL.

d) The amounts paid to NSEL for purchase of commodities is to be construed as an investment and hence the loss arising therefrom is to be construed as capital loss and hence not allowable as deduction.

e) The assessee had purchased castor oil, paddy and cotton wash seed oil which means that assessee has recognised the purchase as genuine. It is not in dispute that the transactions were actually paid by the assessee and the same is fictitious in nature. The Hon'ble Bombay High Court had ruled and given the finding that the transactions were not genuine and fictitious

in the case of bail application of Shri Jignesh Shah, main promoter of NSEL.

f) The Hon'ble Bombay High Court observed that the broker and clients of NSE were in knowledge about the true nature of the transactions. Thus, there is no doubt that assessee was aware of the true nature of the transactions as fictitious. Thus the treatment of both purchases and sales are to be treated as identical. Either both purchase and sales are fictitious or both are real and genuine.

g) The closing stock of commodities cannot be valued at NIL.

h) The onus was on the assessee to prove that sale was not reversed. The assessee had paid VATR on 5.7.2013 and did not know of the scam till 31.7.2013. Thus for 25 days, the assessee was treating the transaction as sale. Thereafter while finalising the books, it has reversed the sale, This is clear from qualitative chart of stock submitted as part of audit report. The same has been noted by the auditor who has gone through the basic primary documents like sale ledger, stock ledger etc and gave his finding on the audit report. The assessee did not dispute the findings of the auditors. The assessee has deliberately reversed the sale while finalising the accounts so that the stock can be taken as Nil. If assessee had credited sale, then the claim of assessee would have come to writing off receivables from NSEL. Thus the claim of assessee would have been allowability of bad debts instead of valuation of closing stock. It is established that assessee had receivables from NSEL. The claim of receivable from NSEL deserved to be not allowed as bad debts as assessee had itself reversed the sales. The ld AO mentioned that assessee had explained that both sale and purchase contracts are entered on same date. The purchase settlement is done in T+2 (or 3 or 5) and

sale in T+25 (or 36 or 30) days. Thus the bye laws of NSEL mandates that both sale and purchase has to be booked simultaneously on same date with settlement at future date. In this regard, the assessee submitted that sale is recognised after the name of the party to whom it is sold is conveyed by NSEL to assessee.

i) The scam came to knowledge only on 31.7.2013. If assessee contention is correct then only sales after 24.7.2013 should not have been recognised. Because assessee submitted that sales party name is received from NSEL within 7 days of booking. Further assessee could not produce any evidence of the fact that purchase of 3190 tons of castor oil , 10200 tons of cotton seed wash oil and 12000 tons of paddy was made before 24.7.2013. If the dates of sauda of these items are before 24.7.2013, then the name of sales party must have been communicated to the assessee before 31.7.2013. Thus there is no reason to treat these sales separately by the assessee. The assessee could not produce the date in which sale is recognised and compare it with date when sales party name is received by NSEL. Thus the contention of the assessee as to when sale is recognised could not be established. Further it is seen from VAT ledger submitted that the last VAT for castor oil is paid on 5.7.2013 which is 25 days before 31.7.2013. Hence the assessee was having name of parties to whom sales were made by NSEL. Assesseee is deliberately trying to present incorrect facts that it has no information for sales parties so that it can rationalise its non-recording of sales. Thus in essence, the assessee has recorded these sales and reversed them and treated the stock at Nil.

4.1. With the aforesaid observations, the ld AO disallowed the loss on account of commodity transactions with NSEL as not forming part of

books of accounts , both under normal provisions of the Act as well as in the computation of book profits u/s 115JB of the Act.

5. We find that the ld CIT(A) deleted the disallowance of loss by placing reliance on the decision rendered by him in the case of group concern of the assessee namely,Dolat Investments Limited for Assessment Year 2014-15where exactly similar disallowance was made by the ld AO.

6. The ld DR vehemently argued by placing heavy reliance on the assessment order. The gist of the various arguments made by the ld DR could be summarised as under:-

a) NSEL is a commodity exchange which is completely different from National and Bombay Stock Exchange (NSE and BSE) . With regard to commodities transaction traded in NSEL platform, the commodities purchased are supported by a warehouse receipt and hence there can be no situation of non-delivery of goods to the assessee. Hence correspondingly assessee incurring loss on account of non-delivery of goods by NSEL is a mere impossibility.

b) The assessee had claimed this loss on account of cost of commodities purchased (stated to be not delivered by NSEL) in the same year in which the purchases were made. Admittedly the Asst Year 2014-15 was the year in which the NSEL scam also got unearthed and how can the assessee reach to the conclusion that it would not be able to recover the cost of commodities from NSEL in the same Asst Year 2014-15 itself. He argued that cases were filed with EOW and some persons have even received some part of monies in subsequent years.

c) The assessee had dealt in odd kinds of commodities which had allegedly resulted in loss to the assessee. These are not regular commodities that could be traded by any prudent businessman. Hence the alleged loss that had arose to the assessee would only be speculative loss.

d) When other parties had received some monies from NSEL in subsequent years, how come the assessee had not received any monies from NSEL.

e) The assessee had actually not paid Rs 87 crores towards the cost of commodities purchased (but allegedly not delivered) to NSEL through its broker. Hence the assessee would not be entitled for any loss as deduction.

7. We find that the assessee had shown inventories held as stock in trade comprising of shares & securities and Commodities , both valued at the lower of cost or market value under the head 'Current Assets' in its Balance Sheet as on 31.3.2014. The assessee had duly shown purchase of traded goods comprising of castor oil, caster seed, cotton, cotton oil cake, cotton seed wash oil, gold, H R coil, paddy, raw wool, rubber, refined soya oil, silver, soyabean and steel totalling to Rs 1725,81,18,744.73 in its profit and loss account. Similarly, it had shown trading sales of products to the tune of Rs 1724,44,35,550.81 together with other operating revenue in the form of Mark to Market (MTM) on Hedged Commodities Futures amounting to Rs 14,77,36,523.33 and receipts from NSEL amounting to Rs 5,56,00,000.68 under the head 'Revenue from Operations' in its profit and loss account for the year ended 31.3.2014. The assessee had also disclosed the movement in opening and closing stock of traded goods as 'Changes in inventories of traded

goods' amounting to Rs 87,12,24,639.87 in its profit and loss account for the year ended 31.3.2014.

7.1. We find that the assessee in the significant accounting policies and notes to financial statements for the year ended 31.3.2014, had specifically stated under the head 'Exceptional Items' as under:-

> *28. Exceptional Items*
>
> *The Company has unsettled exposure of Rs 8943.41 lakhs through NSEL / broker for various commodities trade. As no physical stock is received from / through NSEL , the sales recognised is reversed due to fact that NSEL ahs not been able to adhere to its payment obligations.*
>
> *Further as company has paid Rs 8793.87 lakh as cost of purchases for which no stock is received by the company as referred above, hence the said cost is written off as business loss while determining stock in trade as on 31.3.2014. Company received a sum of Rs 556.00 Lakhs towards disputed transaction on platform of NSEL and same is offered as income and shown under income from operation.*
>
> *(emphasis supplied by us)*
>
> *Economic Offence Wing (EOW) of Mumbai Police is investigating the unsettled transactions of NSEL on the basis of complaint filed by NSEL Investors Forum of which Company's Broker is a member and said forum has also filed writ petition in the Bombay High Court.*

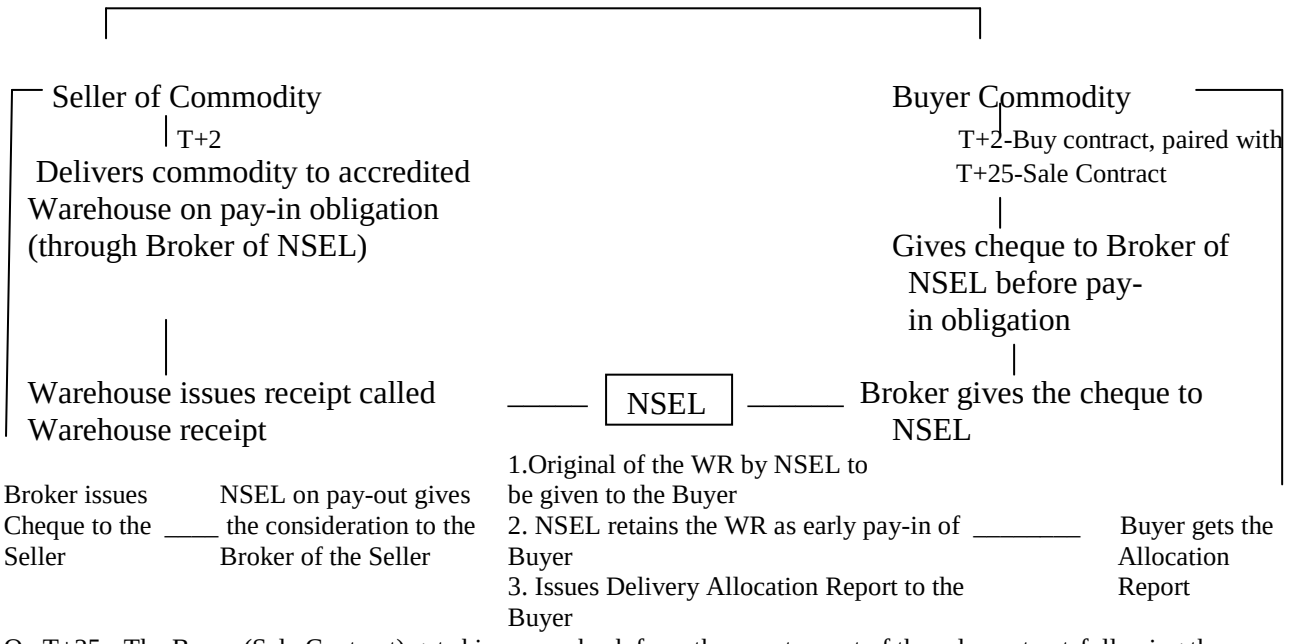
7.2. We find that the Statutory Auditors in their Statutory Audit Report had categorically stated that the company is maintaining proper records of inventory (being shares, securities and commodities). Discrepancies noted on physical verification of inventories were not material, except for transactions on National Spot Exchange Ltd (NSEL) platform.

7.3. We find that the assessee had given the quantitative details of traded goods in Annexure 7 to the Form 3CD (Tax Audit Report) for the Asst Year 2014-15 which is already forming part of the records of the lower authorities.

7.4. We find that the assessee had furnished the complete details of Commodity Transactions with quantity and value wise details along with payment of Commodity Transaction Tax (CTT) before the ld AO at the time of assessment proceedings. The relevant documents together with the Contract Notes and the details of trading in Commodities in which the assessee incurred losses were also duly highlighted and furnished before the lower authorities. These facts are not in dispute before us.

7.4.1. The ld AR before us at the time of hearing explained the concept of Paired Contracts in a diagrammatical representation as below:-

PAIRED CONTRACTS



On T+25- The Buyer (Sale Contract) gets his money back from the counter part of the sale contract-following the same mechanism of pay-in and pay-out obligations

7.5. From the perusal of the financial statements of the assessee for the year ended 31.3.2014 together with the significant accounting policies and notes forming part of accounts and statutory audit report, we find that the assessee had actually made payment of Rs 8793.87 lakhs towards cost of commodities for which no stock was received by the assessee. Hence the argument advanced by the ld DR that no payment was actually made by the assessee to NSEL, deserve to be dismissed. This trading transaction was admittedly done on NSEL platform through SEBI registered broker. The assessee was given only warehouse receipt, which is supposed to prove that the commodities are lying in the NSEL accredited warehouses. But the SGS Audit Report (independent auditor) had pointed out that the requisite stocks were not available in the NSEL accredited warehouses. Hence it could be safely concluded that the assessee had not got back any commodities for the actual payments made by it to NSEL through its registered broker. These payments were actually made by the assessee for cost of commodities purchased (but not delivered). We find that the assessee has been consistently showing the trading transactions of commodities in NSEL platform from Asst Year 2012-13 onwards under the head 'income from business' only , which has been accepted by the revenue in the past. Even during the year under consideration, we find that the ld AO had accepted the other trading transactions of commodities in NSEL platform as business income. Then how the loss arising on account of irrecoverable purchase cost of commodities on impugned specified contracts alone become speculative in nature. We are unable to persuade ourselves to accept to this proposition of the ld DR. Only when the commodities are actually delivered to the assessee for the payments made by the assessee to NSEL, the assessee would in turn be able to sell the same again in NSEL platform through registered brokers. In the instant case, the non-delivery

of the commodities to the assessee by the NSEL had been proved beyond doubt as is evident from the (i) SGS Audit Report not being allowed to inspect certain NSEL accredited warehouses and wherever they had been allowed, they found huge shortage of stocks lying in warehouses ; (ii) assessee lodging complaint with EOW along with other traders for recovery of dues from NSEL ; (iii) NSEL initially issuing a press release on 4.8.2013 that it has got post dated cheques of Rs 4900 crores to honor its commitments to various traders ; (iv) assessee along with other traders forming an Investors Forum to fight the case against NSEL for recovery of the dues ; and (v) NSEL itself trying to sell the commodities lying in its warehouses and making payments to the assessee and other traders during the year and also in subsequent years. It is a fact on record that the assessee had recovered the following sums from NSEL and had offered the same as its business income :-

Received in Asst Year 2014-15 itself	- Rs 5,56,00,000.68
Received in Asst Year 2015-16	- Rs 34,38,481.38
Received in Asst Year 2019-20	- Rs 63,01,922.00

We find that the ld DR had lost sight of recoveries made from NSEL by the assessee as listed above. Hence the argument advanced by ld DR on this point is hereby dismissed.

7.6. It is not in dispute that the NSEL scam got unearthed in July 2013 i.e during the year under consideration before us. Hence the assessee after taking all the steps for recovery of its purchase cost of commodities from NSEL , and after coming to a conscious conclusion that the NSEL had in

connivance with various brokers had resorted to cheat various traders such as assessee. All these information got triggered and concluded within the assessment year itself. Hence there is nothing wrong on the part of the assessee to write off the purchase cost of commodities in the same year in which payments were made as irrecoverable amounts and claim the same as regular business loss arising in normal course of its business u/s 28 of the Act. Hence the argument made by the ld DR on this count is dismissed.

7.7. We find that the ld CIT(A) had relied on his order passed in the case of sister concern of the assessee namely Dolat Investments Limited on identical facts and circumstances on the similar issue. It would be pertinent to address the relevant findings recorded by ld CIT(A) in the said order.

7.7.1. Analysis of findings of the CIT(A) in the case of Dolat Investments Limited

a) The ld CIT(A), at the outset, discusses the working of the NSEL and specific facts of the case of the assessee therein (i.eDolat Investments Ltd) which is also similar to assessee before us herein.

b) The ld CIT(A) in para 20 notes that the assessee company had filed the copies of the contract notes issued by the broker namely Purvag Commodities and Derivatives Pvt. Ltd. along with the corresponding Delivery Allocation Reports ('DAR') issued by the NSEL. The contract notes issued by the broker gives the complete details of the order number, trade number, contract description, quality, unit, price,

brokerage and amount. These transactions mentioned in the contract notes have been duly executed on the online exchange platform of NSEL. A perusal of the contract notes and the Delivery Allocation Reports reveals that the purchase and sale transaction of the assesseecompany cannot be held to be non-genuine / bogus by any stretch of imagination. The ld CIT(A) further goes on to discuss the DAR issued by the NSEL and holds that its contents clearly shows that NSEL had duly informed the assessee company that for the purchases made by it, the ownership of the commodities in the form of the warehouse receipts is with the assessee company. However, such warehouse receipts were in the custody of NSEL. This clearly shows that the assessee company had made a valid purchase transaction on the Exchange and further, the Exchange had confirmed the same by giving the Delivery Allocation Report of the said commodities.

c) In para 21, the ld CIT(A) discusses the letter issued by the broker namely, Purvag Commodities and Derivatives Pvt. Ltd. to the assessee company dated 20.08.2013, wherein the assessee company had been informed that the payment towards the sales transaction has not been received from NSEL and hence, the receivable amounting to Rs. 43,12,65,350/- may be treated as its business loss. He further observes that the above letter clearly states that NSEL had stopped paying the funds relating to the disputed paired trades, as the counter parties had defaulted in their payment obligation. M/s. Purvag Commodities and Derivatives Pvt. Ltd. had further, stated that in these circumstances they are unable to meet the pay-out obligation to the assessee company. The said letter also suggests the assessee company to institute legal remedies available to them at the appropriate forums. The ld CIT(A) further observes that the

Broker had further confirmed that full payment had been made by the assessee company to them on account of the purchase transactions worth Rs. 42,62,16,780/-. It had also been confirmed by the Broker that the amount paid by the assessee company towards the disputed purchases have been fully remitted by them to NSEL, on behalf of the assessee. Further, it had been informed by the Broker that the corresponding unsettled amount of sale receivable of Rs. 43,12,65,350/- could not be paid to the assessee company, as the same had not been received from NSEL. The ld CIT(A) then discusses another letter dated 25.09.2013 issued by the broker wherein the assessee company had been informed that they have just acted as a broker and intermediary. Hence, are not responsible for obtaining the goods for them or reimburse the same. It had been clearly intimated by the Broker that there are no goods lying at NSEL accredited warehouse, corresponding to the Delivery Allocation Report sent to the assessee company for the purchases of goods. Further, M/s. Purvag Commodities and Derivatives Pvt. Ltd. had also advised the assessee company that the non-recovery of goods may be treated as a business loss by them. Thus the ld CIT(A) holds that the Broker had totally abdicated its responsibility for the said loss and advised the assessee company to institute legal remedies available against NSEL or any other entity, for the breach of contract.

d) In para 22 of the order, the ld CIT(A) discusses the Statutory Winding Up Notice dated 27.11.2013 given to NSEL, which besides giving a winding up notice, also refers to the amount of Rs. 41,35,51,452/- due and payable by NSEL as on 21.11.2013. Thus, it needs to be appreciated that the assessee company had made all efforts

to recover its money lost in the scam. The ld CIT(A) also discusses the reply sent by NSEL in response to the Statutory Winding Up notice given by the assessee company. A perusal of the said reply reveals that the NSEL has clearly stated that they are not bound to pay the outstanding balance to the assessee company, as it is not a trading member of NSEL. Thus, NSEL had totally brushed off the claim made by the assessee company on the ground that they have not contracted with them. The reply of NSEL clearly states that they have contractual obligation towards the members only and not towards their clients.

e) In para 23, the ld CIT(A) observes that assessee company had made every effort to recover the disputed amount resulting from the disputed transactions on NSEL.

f) In para 24, the ld CIT(A) notes that the assessee company had voluntarily offered for taxation on receipt basis in subsequent years, whatever had been recovered from the said amount of loss – the same is accepted by the ld AO as business income.

g) In para 25, the ldCIT(A) discusses the reliance of the ld AO on financial capability of NSEL and their legal responsibility to hold that the business loss of the assessee company is still recoverable and hence, the claim of business loss is premature in nature. The ldCIT(A) observes that the claim of the ld AO that NSEL guarantees the settlement of net financial obligations does not hold any ground, as there is no material on record to show that NSEL had come forward to own up the financial liability of the clients, who had suffered from the fraud.

h) In para 26, the ld CIT(A) discusses the circular dated 29.7.2013 issued by the NSEL, wherein the settlement schedule of all the contractswithdeliveryschedulesmorethanT+10dayshadbeenmodifie dto T+10days – this circular hinted towards the scam. Further, in para 26.1 to 26.3, the ld CIT(A) discusses the circular on reduced settlement dated 04.08.2013, which clearly shows that NSEL had refused to own up the liability arising out of the scam. Its main argument & contention before the Hon'ble High Court were

- it is not central counterparty;
- if it is a counterparty then such guarantee is limited to the Settlement Guarantee Fund;
- that NSEL has the authority to withdraw itself as a counterparty from the transactions which are financial transactions or structured deals or transactions designed to defraud the Settlement Guarantee Fund.

i) In para 27, the ld CIT(A) discusses the financial strength of the NSEL and how NSEL does not have the requisite capacity to pay the huge liability. The ld CIT(A), then, counters the argument of the ld AO by stating that the ld AO had completely failed to take note of the fact that NSEL doesn't have the financial capacity to pay for the liabilities arising out of the scam. Not only this, NSEL gone further ahead to clearly state in its Audited Financial Accounts that they are not liable to pay the amount of Rs. 4905.60 Crore to the non-defaulting members. In these facts and circumstances, the ldAO had wrongly concluded that the amount payable to the assessee company by NSEL is recoverable and the same is guaranteed by NSEL.

j) In para 28, the ldCIT(A) discusses the fact that how NSEL Scam had thrived on the fact that the Warehousing Receipts were not backed by actual goods in the godowns / delivery centres / warehouses. However, he further states that the NSEL had totally abdicated its responsibility and liability about the non-availability of the physical goods against the various Warehousing Receipts. The stand taken by NSEL is that there is no liability of NSEL regarding the commodities lying in the designated delivery centres/warehouses relating to transactions carried out by members on the Exchange Platform. Thus, the ldCIT(A) holds that the ld AO had grossly erred in holding that the NSEL had the legal as well financial responsibility for making good the business loss of the assesseecompany, arising out of the missing goods.

k) In para 29, the ldCIT(A) counters the argument of the ld AO that the Settlement Guarantee Fund (SGF) of NSEL, also guarantees the settlement of net financial obligation. The ldCIT(A) observes that there is only Cash Margin amounting to Rs. 37,46,08,831/-, which is available in the SGF-MC account. This amount lying in SGF is too meagre to cater to the financial liability of more than Rs. 5600 Crore arising out of the Scam. Further, the notes to accounts of NSEL also makes it clear that the Margin money is refundable to the respective member and is only subject to adjustment of the exposure of that particular member. The above discussion makes it clear that nothing is available from the corpus of SGF, which can be paid to the assessee company or the other clients, who had lost their money in the scam. The ld CIT(A) thus, states that the ld AO had talked about the guarantee provided by the NSEL in his assessment order, but on the contrary the NSEL had clearly stated that though it had taken several legal, regulatory and commercial measures, but it is not

sure as to how much money and by when it will be recovered, as the matter is still sub-judice. Accordingly, the ldCIT(A) holds that the ld AO had again wrongly held that the business loss of the assessee is fully guaranteed and covered by the Settlement Guarantee Fund.

l) In para 30, the ld CIT(A) counters the argument of the ld AO that the properties of NSEL and associate companies are under attachment and since the seized assets are yet to be realized, the amount of loss incurred by the assessee cannot be treated as irrecoverable. The ldCIT(A) holds that the ld AO had erred in holding that the business loss is recoverable, ignoring the vital fact that no worthwhile assets of NSEL are under attachment and the assets of the holding company are too meagre to make good of the money lost in the scam.

m) In para 31, the ldCIT(A) discusses the report of SGS (Auditors) wherein the physical inspection by SGS of 16 warehouses had revealed that as against stock of Rs. 2389.36 crores, stock worth only Rs. 358 crores was available. SGS had also reported that they were physically prevented from inspecting 22 warehouses, although they had been engaged by NSEL to inspect its own stock supposed to have been lying in its own warehouses. As such, the ldCIT(A) observes that the assesseecompany, though had duly made the payments for purchase of the commodities but the goods/commodities were not found at certified warehouses / centres, the assessee company had rightly quantified the loss at Rs. 42,61,89,780/-, being the cost of goods purchased.

n) In para 32, the ld CIT(A) observes that the entries passed by the assessee company are in accordance with the Accounting Standards. He

counters the observation of the ld AO that the value of stock not found at warehouse of NSEL cannot be valued at NIL, though the fact is that the stock was physically not available or traceable, even as per the SGS Audit Report. The ld CIT(A) holds that the ld AO failed to appreciate that the assessee company follows cost or market value whichever is less, as the method of valuation of stock in respect of commodities. The declaration in the Significant Accounting Policies at Note 2.7 clearly states that commodities stock held as stock-in-trade under current assets are valued at cost or market value, whichever is lower on a FIFO basis. He further, notes that when a theft, burglary etc. occurs, the goods are written off by valuing them at Rs. NIL, if there is no chance of any recovery of goods. In the present case, SGS Audit Report had clearly revealed that goods purchased by the assessee company had not been found in the designated warehouses of NSEL. Further, the assessee company had already made the payments for such purchases. In these facts and circumstances, the closing stock had been rightly valued at Rs. Nil by the assessee company. The ld CIT(A) then observes that the assessee company had correctly followed the Accounting Standard – 9 and holds that the Accounting Policy followed by the assessee company, the contract for sale cannot be recognized as revenue, since the goods cannot be transferred to the buyer on a date, when it was supposed to have been transferred. This was because of the fact that there was no stock of goods in the warehouse of NSEL. The sale transactions therefore do not qualify to be accounted for as revenue, as per the Accounting Standard published by Institute of Chartered Accountants of India. Hence, the sale transaction even though booked in the accounts was required to be reversed, as revenue cannot be recognized when the property in goods are not and cannot be transferred to the buyer.

o) In para 33, the ld CIT(A) discusses the classification of loss as speculation loss by the ld AO by virtue of section 43(5) r.w.s. 73(2) of the Act. He observes that as per the definition of 'speculative transaction' under section 43(5), only those transactions are covered under it, which arises from the contracts of purchase or sale of good sand are periodically or ultimately settled otherwise than by actual delivery. Thus, 'settlement' of a contract is *sine qua non* before treating any transaction to be speculative in nature. He further, holds that the impugned contracts for purchase & sale of commodities that took place on floor of the NSEL platform and wherefrom loss had arisen to the assessee were not 'settled' at all. Both the purchase and sale trades of the paired contract could not be executed, as the underlying asset viz. the goods lying in the accredited warehouse / centres were found to be missing. Hence, there was a breach of contracts rather than settlement of contracts in the present case at hand. Accordingly, if there is no settlement of the purchase and sale contracts, then there cannot be any speculative transaction, as per the provisions of section 43(5) of the Act. For this proposition, he relies on the decision of Supreme Court in the case of Commissioner of Income-tax v. Shantilal (P) Ltd reported in 144 ITR 57 (SC), wherein it was observed that a contract can be settled if, instead of effecting the delivery or transfer of the commodity envisaged by the contract, the promisee, in terms of section 63 of the Contract Act, accepts instead of it any satisfaction which he thinks fit. Where, instead of such performance or acceptance, the parties raise a dispute and no agreement can be reached for a discharge of the contract, there is a breach of the contract, and by virtue of section 73 of the Contract Act, the party suffering by such breach becomes entitled to receive from the party

who broke the contract, compensation for any loss or damage caused to him thereby. There is no reason why the sense conveyed by the law relating to contracts should not be imported into the definition of 'speculative transaction' in section 43(5) of the Act. The award of damages for breach of a contract is not the same thing as a party to the contract accepting satisfaction of the contract otherwise than in accordance with the original term thereof. It may be that in a general sense the layman would understand that the contract must be regarded as settled when damages are paid by way of compensation for its breach. What is really settled by the award of such damages and their acceptance by the aggrieved party is the dispute between the parties. Section 43(5) speaks of a settlement of the contract, and, consequently, where there is a breach of the contract resulting in a dispute between the parties and culminating in award of damages as compensation by an arbitration award, the transaction cannot be treated as a 'speculative transaction' within the meaning of section 43(5) of the Act. Thus, the ld CIT(A) holds that a contract which is not performed or is breached cannot be covered under the provisions of Section 43(5) of the Act relating to speculative transactions. The ld CIT(A) further, makes a mention of the fact that delivery allocation report is being issued by the NSEL clearly proves that both the purchaser and the seller, takes and gives delivery, respectively. Hence, the paired trades in which the assessee is dealing cannot be treated as speculative in nature, as they are delivery based. The ld CIT(A) further, notes that there were other transactions of purchase and sale of commodities through NSEL of paired trades, which have been accepted by the ld AO and the income therefrom had also been correctly accepted as

non-speculative business income. It is worthy to note that the trading on the NSEL platform in commodity in the case of the assessee company were also accepted for the past years as non-speculative in nature, since A.Y. 2012-13.The assessee has offered subsequent recoveries from NSEL as business income which has been accepted by the revenue as such. Then how the loss arising out of irrecoverability of cost of commodities purchased which were not delivered at all, would alone become speculative loss. Hence the argument of the ld DR on this account deserve to be dismissed.

p) In para 34, the ld CIT(A) dismisses the observations of the ld AO that impugned transactions are derivative trades as "*too far-fetched and needs to be rejected outrightly*". He holds that since the mandatory condition stipulated in the main section 43(5) of the Act is not satisfied, there is no occasion before the ld AO to go to the proviso to the main section and read between the lines the exclusions contained in clause (a) to(e) thereon.

q) In para 35, the ld CIT(A) has held that reliance of the ld AO on Judgment of the Hon'ble Jurisdictional High Court on the Bail application of Shri Jignesh Shah, Promoter Director of NSEL is misplaced inasmuch as Bail application of Shri Jignesh Shah is on an entirely different issue, though it had emanated from the same NSEL Scam.

r) In para 36, the ldCIT(A) observes that the claim of the business loss by the assesseecompany are supported by various documents – in the case of the assessee which are already listed hereinabove.

s) In para 37, the ldCIT(A) holds that the business loss as claimed by the assessee is nothing but a loss due to embezzlement and should be

allowed under the Act. For this, he relies on Circular No. 35-D (XL-VII-20) [F.No.10/48/75-IT(A- 1)], dated 24-11-1965 of the CBDT. He also states that the impugned loss has been incurred in the regular course of business. Further, he relies on various decisions of Hon'ble Supreme Court and various Hon'ble High Courts and concludes that the business loss incurred by the assessee company, as a result of the NSEL Scam on the transactions executed on the Exchange Platform is allowable, as the same had been incurred in the normal course of business.

t) In para 38, the ld CIT(A) refutes the arguments of the ld AO that the transactions executed by the assessee company are non-genuine / bogus by stating that all the purchase and sale transactions of the assessee company had been conducted online on the exchange platform of NSEL. Trading on the electronic exchange platform is anonymous order driven trading system i.e. the buyer does not know the seller in the same way the seller does not know the buyer, and that the ld AO has not brought any adverse material on record to show that the assessee company or its broker have manipulated the online trading system. The ld CIT(A) also places reliance on various decisions of Tribunals and a decision of Hon'ble Jurisdictional High Court in the case of *CIT v. Jamna Devi Agarwal reported in 328 ITR 656* (Bom).

u) In para 39, the ld CIT(A) states that the claim of the ld AO is based on conjectures, surmises, assumptions and presumptions only. He further, relies on various decision of Hon'ble Supreme Court and various Hon'ble High Courts wherein it was held that no addition can be made without

bringing material evidence on record and that a 'suspicion' however strong cannot substitute the place of legal proof.

v) In para 40, the ld CIT(A) holds that the Revenue cannot place itself in the armchair of a businessman. He observed that it is a material fact on record that NSEL could not deliver the goods after taking the purchase consideration and accordingly, the management decided to recognize the loss suffered in the normal course of its business. It is settled law that claim for expenses and losses are to be viewed from the businessman's perspective and so long they are for the purpose of the business or incidental to carrying on business, the same are to be allowed. The ld AO cannot sit in chair of the businessman and decide how and when loss is to be claimed, when the fact of incurring the loss in the normal course of the business is not doubted. For this, he placed reliance on the decision of *Hon'ble Supreme Court in the case of S A Builders reported in 288 ITR 1(SC) and Hon'ble Delhi High Court in the case of Dalmia Cement reported in 254 ITR 377 (Del).*

w) In para 41, the ldCIT(A) relies on the decision of Mumbai Tribunal in the case of *Conwest (P) Ltd. vs. First ITO reported in 7 ITD 314* and holds that the business loss appearing in the audited accounts needs to be allowed.

x) In para 43, the ld CIT(A) takes note of the fact that the assessee company had offered the amount recovered from NSEL as and when it is recovered. The said amount has been offered as business income under

section 41(1)/ 41(4) of the Act. The ld CIT(A) then holds that this may result in double taxation which is not permissible.

y) In para 44, the ld CIT(A) concludes his order on the relevant grounds of appeal and holds that "*In these facts and circumstances of the case, it is held that the Appellant Company had suffered a trading loss in the normal course of business, wherein the Appellant Company had made payment for the purchases made but has not got the delivery of the goods purchased. Hence, the payment made for the purchase trade is to be treated as a business loss of the Appellant Company, which is allowable u/s 37(1) of the Act.*"

7.8. We deem it fit to address the issue as to whether the loss arising on the impugned transaction could be construed as speculative loss specifically as more emphasis has been laid on the same by the ld DR at the time of his arguments as well as during his rejoinder at the time of hearing. We find that the ld AO had disallowed the claim of business loss of the assessee on the ground that loss claimed is speculative in nature and therefore the same would be eligible for set off only against speculation profit. In our considered opinion, the ld AO had wrongly interpreted the provisions of section 43(5) of the Act. For the sake of convenience, the said provisions are reproduced below:-

> *"43. In sections 28 to 41 and in this section, unless the context otherwise requires—*
>
> *……..*
>
> *(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) 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 recognised stock exchange; [or]]

The following clause (e) shall be inserted in proviso to clause (5) of section 43 by the Finance Act, 2013, w.e.f. 1-4-2014 :

(e) an eligible transaction in respect of trading in commodity derivatives carried out in a recognised association,

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 recognised 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) "recognised stock exchange" means a recognised 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[74] by the Central Government for this purpose;]

The following Explanation 2 to clause (5) of section 43 shall be inserted by the Finance Act, 2013, w.e.f. 1-4-2014 :

Explanation 2.—For the purposes of clause (e), the expressions—

(i) "commodity derivative" shall have the meaning as assigned to it in Chapter VII of the Finance Act, 2013;
(ii) "eligible transaction" means any transaction,—

(A) carried out electronically on screen-based systems through member or an intermediary, registered 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 directions issued under that Act on a recognised association; and

(B) which is supported by a time stamped 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 (A), unique trade number and permanent account number allotted under this Act;

(iii) "recognised association" means a recognised association as referred to in clause (j) of section 2[74a] of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) and which fulfils such conditions as may be prescribed and is notified by the Central Government for this purpose;

7.8.1. From the plain reading of the above provisions, it is clear that to label any transaction as "speculative transaction", certain conditions are to be met. The term "speculative transactions" have been defined under the Act for the purpose of section 28 to 41 pertaining to computation of "Income from Business & Profession" and hence it is to be read strictly as it begins with the word 'means' while defining the term 'speculative transaction' and it is not to be considered as definition of explanatory nature. The ld AO treated the impugned transactions as speculative transaction as there was no actual delivery of the goods. In our considered opinion, he erred in applying the test of 'actual delivery' without first satisfying whether a contract for purchase and sale falls within the ambit of a contract envisaged under law. We find that the definition of 'speculative transaction' covers only those transactions

arising from a contract of purchase or sale of goods which is periodically or ultimately settled. The 'settlement' of a contract is *sine qua non* before considering it with other conditions stipulated in the definition. If therefore, a contract of sale or purchase is not settled, then no further condition can be tested to determine transaction as speculative or non-speculative. If it meets the condition of 'settlement' then only further condition of actual delivery or transfer of commodity or scrip need to be tested. Secondly, 'settlement' referred to in the section 43(5) should emanate from a contract where it is either performed or the promisee dispenses with or remits, wholly or in part, the performance of the promise made to him or accepts instead of it, any satisfaction he thinks fit. A contract which is not performed or where there is breach of contract cannot be covered as it lacks fundamental aspect of 'settlement' as required by section 43(5) of the Act.

7.8.2. In the instant case before us, the impugned contract of purchases that took place on floor of the NSEL and wherefrom loss arose are not 'settled' at all. Of course, the issuance of warehouse receipt by NSEL could be construed as settlement. But the undisputed fact is that the warehouse receipt was retained by NSEL itself and never handed over the assessee company. Moreover, as per SGS audit report, there were no physical goods in requisite quantity as stated in the delivery allocation report and warehouse receipt, present in the accredited warehouses of NSEL, which came to light during physical inspection by SGS. Hence the transfer of warehouse receipts by NSEL on behalf of buyers and sellers cannot be considered as 'actual delivery' for the purpose of section 43(5) of the Act as settlement of contract did not take place at all as is evident from SGS audit report reporting the stock discrepancies. In the instant case, the impugned loss arose upon not finding the stock belonging to the

assessee in accredited warehouse of NSEL. It does not arise upon settlement of a contract which in reality remains unperformed for the promise made. The loss also does not arise upon settling of contract for purchase with contract for sale. The impugned transactions and therefore loss arising from these purchase transactions cannot by any stretch of imagination be treated as 'speculative transaction' covered under section 43(5) of the Act. This aspect is no longer res integra in view of the decision of *Hon'ble Supreme Court in the case of CIT vs Shantilal (P) Ltd reported in 144 ITR 57 (SC)* wherein the term 'settlement' has been explained as under:-

> *"The law, however, speaks of a settlement of the contract, and a contract is settled when it is either performed or the promisee dispenses with or remits, wholly or in part, the performance of the promise made to him or accepts instead of it any satisfaction which he thinks fit."*

In the above decision, their Lordships have also distinguished the decision in case of *Davenport & Co. (P) Ltd. v. CIT [1975] 100 ITR 715* which was heavily relied upon by the ld AO in the present case.

7.9. Further we find that the ld AO in para 6.13 of his order erred in treating the impugned transaction of purchase and sale (which never fructified) as 'commodity derivative' transactions and hence he treated it as speculative transaction as, in his opinion, it does not fit into exception provided in clause (e) of proviso to Section 43(5) of the Act. He erred in interpreting the proviso enacted to give different meaning for certain types of contracts listed in clauses (a) to (e) which otherwise would be treated as 'speculative transaction' in terms of section 43(5) of the Act.We find that the proviso to section 43(5) of the Act is meant to exclude certain types of transactions from the definition of 'speculative transaction' by treating them as non speculative. It therefore follows that for any

transaction to be treated as deemed/non deemed speculative transaction, it has to first fit into the definition of 'speculative transaction'defined in section 43(5)of the Act before proviso. As explained in earlier paragraph,since a contract of purchase or sale itself does not fall into definition of 'speculative transaction' as they are not 'settled' ,the question does not arise at all of treating transaction as 'commodity derivative' not qualifying or fitting into clause (e) of the Proviso to Section 43(5) of the Act.

7.10. Yet another aspect that remains to be addressed is that the ld AO had treated the loss arising from impugned transactions as bogus and non-genuine. We find that the ld AO in Para 6.7 of his order alleged that both purchase and sale transactions are bogus and non-genuine. He also alleged that the assessee was aware of the true nature of the transaction that they are fictitious. We find that these allegations are baseless and are only based on conjectures and assumptions. The transactions were entered on electronic platform provided by NSEL. The counter party for sale or purchase of commodity were not known to the assessee when trades were executed. The assessee has paid for the purchases from own funds. The delivery allocation report are received for the purchases made. NSEL as per regulation of bye-laws was required to verify and weigh the goods before receiving the goods in their accredited warehouse and then only warehouse receipt was to be issued. The delivery allocation report mentioned full details of goods, and hence the goods were identifiable. The details mentioned included End Client code (in present case "2101") for the assessee, WR/SR No. (Warehouse Receipt No.), Lot/QC No., Weight, and warehouse location. When the assessee acted on knowing these facts, it cannot be made a party to wrong doing of others, moreso when it is not a beneficiary to the wrong doing but in fact a sufferer of the

loss. The allegation of the ld AO that the assessee was aware of the fictitious and managed transactions are therefore, not only baseless, but also illogical that no person will put oneself knowingly into a situation risking his own money in a fictitious and managed transaction.

7.10.1. It is pertinent to note that during the year, there were other transactions of purchase and sale of commodities through NSEL which are accepted by the ld AO as genuine and the income therefrom is also correctly accepted as non-speculative business income. It is worthy to note that the trading on NSEL platform in commodity were also accepted for past years since the Asst Year 2012-13 onwards when such transactions were carried out regularly by the assessee.

7.11. With regard to valuation of stock in respect of cost of commodities not received by assessee from NSEL at Rs Nil , the same has been done as per method of valuation of closing stock at lower of cost or market price by the assessee. Admittedly, this method has been consistently followed by the assessee year on year, which has been accepted by the revenue in the past. The assessee's plea is that having paid monies for the purchase cost of commodities, the assessee got cheated by NSEL by not having the delivery of goods and which fact is also confirmed by SGS audit report wherein it has been categorically stated that the requisite quantity of commodities were not lying in the NSEL accredited warehouses, thereby making the warehouse receipt issued by NSEL as scrap paper, it had no other option to value the stocks not received at Nil. We find that stock of commodities are held as stock-in-trade under current assets which are valued at cost or market value, whichever is lower on FIFO basis. When theft, burglary etc. occurs, the goods are to be written off by valuing them at Rs NIL if there is no chance of any recovery of goods. In the present

case, since the SGS Report showed that goods purchased were not found in the designated warehouses of NSEL and the assessee had already made the payments for the purchases and received Delivery Allocation Report, the closing stock was valued at Rs. NIL in respect of such goods as there was no physical stock found at the accredited warehouses of NSEL. In our considered opinion, no fault could be attributed on the assessee in this regard.

7.12. With regard to reversal of sales when no sale could be said to have been effected in the absence of goods , we find that that NSEL was acting as agent and custodian of the goods purchased by the assessee. Upon payments to NSEL and receipt of the Delivery Allocation Report, the property in goods lying in warehouse is transferred to the assessee and NSEL acts as custodian/trustee to the assessee. Non-existence of goods was revealed when audit by SGS Report found that in most of the cases goods were not available in the warehouse. Since payments for purchases were already made and delivery of goods were received by way of Delivery Allocation Report the purchases are rightly accounted for by the assessee as per the accounting principles followed. Once purchases are accounted in the books then under normal circumstances, sales are booked if they are sold. But in the instant case, the sales could not be effected actually as there were no goods lying in the NSEL accredited warehouses as confirmed in SGS audit report. As per Para 10 of Accounting Standard–9 (AS-9) on 'Revenue Recognition' issued by Institute of Chartered Accountants of India (ICAI), the revenue from sales are to be recognized when requirements as to the performance of the contract are satisfied . The performance for sale of goods are to be as per set out in Paragraphs 11 of AS-9. The relevant paragraphs 10 and 11 of

Accounting Standard 9 applicable in case of sale of goods are reproduced below for immediate reference:-

> *"10. Revenue from sales or service transactions should be recognised when the requirements as to performance set out in paragraphs 11 and 12 are satisfied, provided that at the time of performance it is not unreasonable to expect ultimate collection. If at the time of raising of any claim it is unreasonable to expect ultimate collection, revenue recognition should be postponed.*
>
> *11. In a transaction involving the sale of goods, performance should be regarded as being achieved when the following conditions have been fulfilled: (i) the seller of goods has transferred to the buyer the property in the goods for a price or all significant risks and rewards of ownership have been transferred to the buyer and the seller retains no effective control of the goods transferred to a degree usually associated with ownership; and (ii) no significant uncertainty exists regarding the amount of the consideration that will be derived from the sale of the goods."*

7.12.1. Going by the above accounting standard and accounting policy followed by the assessee, the contract for sale cannot be recognized as revenue, as transfer of property in goods is not transferred to the buyer on a date when it was supposed to have been transferred. This is because by the time the date for transfer of goods to buyer arrived, it had already come to light that there are no stock of goods in the warehouse of NSEL. The sale transactions therefore, do not qualify to be accounted as revenue as per the accounting standard published by Institute of Chartered Accountants of India. However, the sale transactions, even though booked in accounts needs to be reversed as revenue cannot be recognized when the property in goods are not and cannot be transferred to the buyer. In present case, before the settlement date of sale contract which were after 31.7.2013, it came to light that goods lying in the warehouse has vanished. The treatment given in books by reversing the sales is in line and in consonance with the accounting policy followed regularly and consistently by the assessee which is declared in audited financial accounts.

7.12.2. Yet another observation made by the ld AO was that the assessee has reversed the sale which could not be done once it is booked in the accounts vide para 6.8 and 6.9 of his order as under. We find that the the matter of recognizing the revenue depends upon the accounting policy followed regularly by the assessee. The accounting policy followed by the assessee in respect of sale of goods as stated in their audited annual accounts at Note No. 2.3 (g) and the same is reproduced below :-

> *"g) Sales*
> *The amount recognized as sale is exclusive of sale/VAT and are net of returns and excludes freight and other charges and accounted at time when the invoices are raised andgoods are delivered."*
>
> *(Emphasis supplied)*

7.13. Another aspect which the ld AO had raised in his assessment order is the inconsistency in quantitative details in tax audit report and notes to accounts in audited accounts. We find that these are not relevant at all to determine the fact of incurring a loss claimed by the assessee when other facts and supporting evidences are sufficient to establish the occurrence of loss. The loss incurred by the assessee is established from the documents produced as also reports from several investigation agencies like EOW. The fact of suffering loss cannot be doubted when there was big hue and cry about the scam when the same is in public domain.

7.14. We find that the ld AO further in his order at para 6.6, reproducedthe operative part of the decision of Hon'ble Bombay High Court in the matter of bail application of Jignesh Shah, promoter Director of NSEL. At the time of hearing of Bail application, the investigation was still under progress. In our considered opinion, the Bail applications are

heard on the basis of *prima facie* facts stated by both parties and it does not carry any precedential as well as evidentiary value. The ld AO while relying upon the decision overlooked the observation of the Hon'ble Bombay High Court which conveyed in no uncertain terms that their decision is based on investigation carried out so far and judging by the broad probabilities of the case as should be done at the stage of bail. Hence reliance placed on the decision of Hon'ble Bombay High Court in respect of Bail application of Jignesh Shah , does not advance the case of the revenue.

7.15. We also find that the assessee had not taken any VAT registration under any state in India and had conducted commodities transactions through its brokers namely Purvag Commodites & Derivatives Pvt Ltd and Jigar Commodities Pvt Ltd and hence assessee is not required to file any VAT returns for its commodity transactions. We find that the assessee had even sought to explain the quantity difference between its books and VAT returns filed by the brokers by stating that except Castor oil and Cotton seed wash oil, all transactions as per balance sheet are matching with the VAT returns. In case of Castor oil and Cotton seed wash oil, agent of assessee had filed its VAT return on the basis of information received from NSEL but sales of castor oil and cotton seed wash oil was actually not executed due to problems at NSEL. It was also submitted that this VAT return could not be revised due to lapse of time. It was specifically clarified that at the time of preparation of balance sheet of the assessee company, the assessee had considered only actual sales and hence not considered sales which were not executed at NSEL. The assessee also furnished the statements showing state wise, commodity wise details and other statement in Exchange wise details. These details are for physical trading of commodities. Overall outcome of both the

statements were showing figures of opening stock, purchases, sales , amount written off, and closing stock of commodities for the year ended 31.3.2014 which are matching with each other. The disputed transactions with NSEL had been separately reflected in such statements. Hence it could be safely concluded that the entire quantitative details of commodities transactions had been duly reconciled by the assessee with its books, stock register, VAT returns filed by broker. Hence the genuinity of loss claimed by the assessee cannot be doubted at all.

7.16. We also find that the co-ordinate bench of Delhi Tribunal in the case of Chowdry Associates vs ACIT reported in 117 Taxmann.com 840 (Delhi Tribunal) dated 11.3.2020 ,had an occasion to adjudicate the identical facts and circumstances of allowability of loss in respect of payments made for purchase of commodities to NSEL wherein it was held that the loss arising thereon would be allowable as business loss u/s 28 of the Act. The operative portion of the said judgement is reproduced hereinbelow for the sake of convenience :-

> *5. During the AY 2015-16, the assessee was trading in commodity derivatives in the association which is National Spot Exchange Limited (NSEL). NSEL ran into regulatory hurdles and as such its operations are stopped by the regulators. The assessee forayed in commodity market since FY 2011-12 and availed services of authorized NSEL agents namely M/s. Anand Rathi Commodities Ltd and M/s. Philips Commodities India Pvt Ltd for that purpose. As the business of trading in NSEL platform was regular one and not in nature of speculative transaction u/s 43(5), the Appellant always treated the trading business of NSEL as regular business and offered for taxation u/s 28. There has been no dispute on these facts since FY 2011-12 and tax department has always accepted the same.*
>
> *6. In the instant AY 2015-16, the AO noticed that the Appellant has claimed loss of Rs. 5,56,24,659/- in relation to trade over NSEL counter owing to non-recovery of the amounts from the brokers as the operations of NSEL were closed. Per the AO, NSEL was formed to be engaged in SPOT Trading but NSEL was carrying out futures contract which was specifically prohibited. Thus, the AO challenged the basic premise about the operations of NSEL. The AO held that the NSEL is SPOT exchange*

and only SPOT contracts can be executed through NSEL, therefore, the contract has to be necessarily settled by delivery within a period not exceeding 11 days from the date of the trade. Any contract that does not get settled by delivery within 11 days ceases to be a SPOT contract and not covered by Forwards Contracts Regulation Act. The AO has not disputed that the assessee has invested in NSEL through two brokers M/s Anand Rathi Commodities Pvt. Ltd. and M/s Phillip Commodities Pvt. Ltd. The assessee company traded on the exchange during F.Y. 2011-12, 2012-13 and 2013-14. The AO also held that the assessee has traded through paired contracts. Paired contract means that an investor would enter into two contracts. A buyer would buy the commodity from the market paying cash for it, and store the commodity in warehouses accredited to NSEL. The buyer then use the warehouse receipts as proof of ownership of the commodity and sell the commodity to financial investors as standard short term contracts (T+2). Immediately after buying the contract, the investor would put the commodity up for sale on a T+26/T+35 basis. Looking at the transactions of the assessee, the AO held that the assessee has entered into two contracts on the same day of the same commodity and the same quantity for buying as well as selling. Hence, the AO held that the assessee is entered speculation business.

……..

12. From the above events and the arguments of the Ld. DR, the following points are flagged:

1. *The assessee has been claiming the transactions of trading on NSEL platform as business income which has been accepted by the revenue in all the earlier years.*
2. *The AO has taken a conscious decision to treat the transactions has speculative in nature during the current year only.*
3. *The AO held that since the contracts are paired there cannot be any loss to the assessee as sale and purchase have been taken simultaneously with the same person.*
4. *The AO held that the SPOT contracts have to be necessarily settled by delivery within a period of 11 days.*
5. *The AO held that the assessee is dealing in "commodity derivatives" and not commodities. (AO-para 5.14)*
6. *The AO held that the transactions of the assessee are speculative transactions as defined u/s 43(5).*
7. *The CEO/NSEL advised not to give benefit of bad debts claimed.*
8. *The CEO/NSEL advised that it is premature to allow the bad debts owing to unsettling of amount of Rs. 5600 crores.*
9. *The CEO/NSEL advised that an amount of Rs. 7000 crores has been secured against the claim of Rs. 5600 crores.*
10. *Hence, CEO/NSEL advised that since the amounts would be settled no provision for bad debts be allowed.*
11. *It is an undisputed fact that the assessee has given money to brokers namely, M/s Anand Rathi Commodities Pvt. Ltd. and Philips Commodities Pvt. Ltd. for conducting of their business.*

12. It is also undisputed fact that the monies given above have not been received by the assessee.

13. The loss arrived out of the non-receipt of the amount from the brokers is claimed to be a business loss by the assessee which has been rejected by the AO.

14. The assessee has also not disputed that the transactions are under paired transactions.

> *13. The ld. AR argued, reiterating the modus operandi the stockists of the commodities first deposited the commodity with the Exchange accredited warehouse and received a warehouse receipt which was deposited with NSEL for the purpose of transactions under the control and supervision of NSEL. The transactions in NSEL are made through members of NSEL, who are authorized brokers. The assessee has made the transactions under paired contracts. Under the paired contract, generally the purchases were made at T+2 cycle and sales were made at T+25 or T+35 cycle. Under these transactions, the assessee company made full payment for purchase immediately and delivery of the commodity lying in the warehouse was assigned to it. The transactions were subjected to VAT, delivery charges, service tax. As far as sale is concerned, the assessee company immediately put a contract for sale on T+25 and T+35 and delivery was assigned from buyer to the seller. The amount is received as and when the transaction is completed. In the assessment years 2013-14 and 2014-15, whatever the transactions were made on NSEL, whatever the profits or losses obtained, the same were duly disclosed in the profit & loss account and assessed as business income.*
>
> *15. From the entirety of the events, we find that in the assessment year 2014-15, the assessee had made purchases in the middle or last week of June 2013 through M/s Anand Rathi Commodities Pvt. Ltd. and M/s Philips Commodities Pvt. Ltd. The NSEL failed to fulfill its commitments and ultimately the Government had prohibited NSEL to make any transactions after 1st July 2013. The details of outstanding unsettled transactions of the assessee through both the brokers has also been furnished to the revenue authorities by the NSEL.*
>
> *16. The AO disallowed the losses as claimed by the assessee on the ground that transactions has carried out by the assessee are speculative transactions settled without the delivery in terms of Section 43(5) of the Act. The AO in the assessment order reproduced the relevant provisions of Section 43(5) upto sub-Section (d) of 45(3). The AO stopped at short of sub-Section (d) without going further to sub-Section (e).*
>
> *17. Reading further, sub-Section (e) which was introduced by the Finance Act, 2013 w.e.f. 1st April 2014 reveals that in respect of trading and commodity derivatives carried out in a recognized association shall not be a speculative transaction.*

The relevant provisions of Section 43(5)(e) are as detailed below.

> *[(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:

18. Further, Explanation 2 for the purpose of clause (e) defines what constitutes "commodity derivative". The meaning has been assigned as per Chapter VII of the Finance Act, 2013.

19. Chapter VII of the Finance Act, 2013 at definitions mentioned at para 106(5)- Commodity derivative means -

(i) *a contract for delivery of goods which is not a ready delivery contract; or*

(ii) *a contract for differences which derives its value from prices or indices of prices-*

(A) *of such underlying goods; or*

(B) *of related services and rights, such as warehousing and freight; or*

(C) *with reference to weather and similar events and activities.*

20. The "eligible transactions" means:

(A) *carried out electronically on screen-based systems through member or an intermediary, registered under the bye-laws, rules and regulations of the recognized 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 directions issued under that Act on a recognized association; and*

(B) *which is supported by a time stamped 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 (A), unique trade number and permanent account number allotted under this Act;*

21. The "recognized association" means:

"recognized association" means a recognized association as referred to in clause (j) of section 281 of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) and which fulfils such conditions as may be prescribed82 and is notified83 by the Central Government for this purpose;]

22. We also find that all the transactions made by the assessee are evidencing the client ID and PA No. and also carried out through computerized exchanged through electronic screen (NSEL) as per the details collected by the revenue.

23. We have also gone through the provisions of the Act introduced vide Finance Bill 2005 in respect of measures to rationalize the tax treatment of derivative transactions. The same is as under:

Under the existing provisions clause (5) of Section 43, a transaction for the purchase and sale of any commodity including stocks and shares is deemed to be a "speculative transaction". If it is settled otherwise than by

actual delivery. However, certain categories of transactions are excluded from the purview of the said provision. Further the unabsorbed speculation losses are allowed to be carried forward for eight years for set-off against speculation profits in subsequent years. These restrictions were essentially designed as an anti-evasion measure to prevent claims of artificially generated losses in the absence of an appropriate institutional infrastructure.

Recent systemic and technological changes introduced by stock markets have resulted in sufficient transparency to prevent generating fictitious losses through artificial transactions or shifting of incidence of loss from one person to another. The screen based computerized trading proves for an excellent audit trail. Therefore, the present distinction between speculative and non-speculative transactions, particularly relating to derivatives is no more required. The proposed amendment, therefore, seeks to provide that an eligible transaction carried out in respect of trading in derivatives in a recognized stock exchange shall not be deemed to be a speculative transaction. The proposed amendment also seeks to notify relevant rules etc. regarding conditions to be fulfilled by recognized exchanges in this regard. Further, it is also proposed to amend sub-section (4) of Section 73 so as to reduce the period of carry forward of speculation losses from eight assessment years to four assessment years.

These amendments will take effect from 1st April, 2006and will, accordingly, apply in relation to assessment year 2006-07 and subsequent years.

24. The revenue has clearly held that the assessee is in the trading of commodity derivatives. Revenue, having said that failed to give the benefit of provisions of Section 43(5)(e). Hence, the transactions done by the assessee shall not be deemed to be a speculative transaction in terms of the provisions of the Act.

25. We have also gone through the accounts of assessee for the earlier years. The amount kept with M/s Anand Rathi Commodities Pvt. Ltd. was Rs. 1.30 crores for the year ending 31-3-2014 and Rs. 4.60 crores for the ending 31-3-2013 and Rs. 2.95 crores for the year ending 31.03.3012. Similarly, the amount kept with M/s Philips Commodities India Pvt. Ltd. was Rs. 4.33 crores for the year ending 31-3-2014 and Rs. 14.95 crores for the ending 31-3-2013. During the year, the assessee could not recover the amounts from these two brokers owing to suspension of operations by the NSEL which was given as a part of the business transaction for purchase of commodities in the conduct of regular business operations. Hence, the amount advanced made to purchase the commodity during the course of the business is a business loss allowable u/s 28 of the Act.

26. We have also perused the notice of PCIT, Central, New Delhi issued under the provisions of Section 263 of the Act proposing to withdraw the bad debts claimed by the assessee and accepted by the Assessing Officer. We categorically refrain from adjudicating on the strength of the notice,

however, we observe that the said notice also dealt with the issue of bad debts claimed u/s 36(1)(vii) by that assessee.

27. We have also perused the order of the Chennai Tribunal in the case of MeghSakariya International Pvt. Ltd. in ITA No. 59/Chennai/2018 wherein the bad debts have been allowed by the Tribunal u/s 36(1)(vii) of the Income-tax Act, 1961. In that case too, the revenue has also brought to the notice regarding the information received from NSEL that trading on that platform was topped since 31-7-2014 and the NSEL was in the process of settling the outstanding dues of its traders and auctioning its assets for the said purpose. The revenue claimed that the claim of bad debts was premature. However, the ITAT has allowed the claim of the assessee based on the judgment of the Hon'ble Apex Court in the case of TRF Ltd. v. CIT 320 ITR 397 wherein it was held that after 1st April, 1989, it was not necessary for the assessee to establish that the debt has become irrecoverable and it was enough if the debt was written off as irrecoverable in the books. Further, the CBDT vide Circular No. 12/2016 clarified regarding the claim of the bad debts, the same is reproduced as under:

Circular No. 12/2016

F.N o.2 79/Misc/1 4 0/2015-ITJ

Government of India

Ministry of Finance Department of Revenue

Central Board of Direct Taxes

New Delhi, Dated 30th May, 2016

Subject: - Admissibility of claim of deduction of Bad Debt under section 36(1) (vii) read with section 36(2) of the Income-Tax Act, 1961— reg.

Proposals have been received by the Central Board of Direct Taxes regarding filing of appeals/pursuing litigation on the issue of allowability of bad debt that are written off as irrecoverable in the accounts of the assessee. The dispute relates to cases involving failure on the part of assessee to establish that the debt is irrecoverable.

2. Direct Tax Laws (Amendment) Act, 1987 amended the provisions of sections 36(1)(vii) and 36(2) of the Income-tax Act 1961, (hereafter referred to as the Act) to rationalize the provisions regarding allowability of bad debt with effect from the April, 1989.

3. The legislative intention behind the amendment was to eliminate litigation on the issue of the allowability of the bad debt by doing away with the requirement for the assessee to establish that the debt, has in fact, become irrecoverable. However, despite the amendment, disputes on the issue of allowability continue, mostly for the reason that the debt has not been established to be irrecoverable. The Hon'ble Supreme Court in the case of TRF Ltd. in CA Nos. 5292 to 5294 of 2003 vide judgment

dated 9-2-2010, has stated that the position of law is well settled. "After 1-4-1989, for allowing deduction for the amount of any bad debt or part thereof under section 36(1)(vii) of the Act, it is not necessary for assessee to establish that the debt, in fact has become irrecoverable; it is enough if bad debt is written off as irrecoverable in the books of accounts of assessee."

4. In view of the above, claim for any debt or part thereof in any previous year shall be admissible under section 36(1)(vii) of the Act, if it is written off as irrecoverable in the books of accounts of the assessee for that previous year and it fulfills the conditions stipulated in sub section (2) of sub-section 36(2) of the Act.

5. Accordingly, no appeals may henceforth be filed on this ground and appeals already filed, if any, on this issue before various Courts/Tribunals may be withdrawn/not pressed upon.

6. This may be brought to the notice of all concerned.

(Sadhana Panwar) DCIT (OSD) (ITJ), CBDT, New Delhi.

28. Thus, we find that the CBDT has unequivocally allowed the claim of bad debts once the same is written off in the books of accounts as irrecoverable. Thus, the argument of the ld. DR that the bad debts should not be allowed which is based on the letter issued by the NSEL that NSEL is in the process of settling the amounts in view of the sufficiency of the assets and not to allow bad debts as the claim is pre-mature.

29. We also hold that, if in any previous year, the debt has been written off as bad and the relevant deduction has also been claimed but later on the same debt is recovered in full or part, then the amount so recovered will be included as income of the financial year in which such amount has recovered. Owing to taxability of the amounts recovered, the revenue would at liberty to tax the amount as and when received in accordance with the provisions of the Act. The department must obtain the information pertaining to payment by the NSEL to brokers/traders on real time basis and bring these amounts to tax net. Hence, the advisory of the NSEL not to allow the bad debts claim would be legally untenable owing to the provisions of the Act, Circular of the CBDT and ruling of the Hon'ble Apex Court in the case of TRF Ltd. v. CIT (323 ITR 397).

30. Further, we have also perused the order in the case of M/s Omni Lens Pvt. Ltd. in ITA No. 2818/Ahd./2010 wherein the matter was referred back to the file of the AO to examine the issue of speculation/non-speculation business after taking note of crucial aspect of actual delivery of the commodity, if any, as claimed and to ascertain as to how the entire debt has turned bad when the assessee was purportedly in possession of the goods purchased. The issue before us is clear on this aspect.

31. The matter before us deals with the non-recovery of the advances given to the brokers. The AO, for the instant year held that the assessee is dealing in speculative transactions and invoked provisions Section 43(5) of the Act. The AO has also held that the assessee has been carrying

trade in commodity derivatives. Section 43(5)(e) considers an eligible transaction in respect of trading in commodity derivatives carried out in a recognized association shall not be deemed to be a speculative transaction. Hence, we hold that the transactions of the assessee shall not be deemed to be speculative transactions. Chapter VII of the Finance Act, 2013 w.e.f. 1-4-2014, details as to what is a commodity derivative in the Commodities Transaction Tax (CTT). As per the CTT commodity derivative means a contract for delivery of goods which is not a ready delivery contract or a contract for differences which derives its value from the prices of such underlying goods. Thus, we find that the assessee is in the business of commodity derivatives but not in the speculation transaction as held by the AO. The revenue has also accepted the income from the transactions of the assessee as business income but not as income from speculation for all the earlier years. (Owing to collapse of the NSEL, no further trading could be conducted by the assessee in the latter years). It is also an undisputed fact that the trade advances given by the assessee stands irrecoverable.

32. In conclusion, keeping in view the facts of the case, a tax history of the assessee , treatment given by the revenue to the transactions undertaken by the assessee, finding of the AO that the assessee is into commodity derivatives, provisions of the Section 43(5) invoked by the AO, provisions of Section 43(5)(e) relied upon by the ld. AR, Explanation (2) of Section 43 as to what constitutes commodity derivatives, Para 5 of Chapter VII of Finance Act, 2013, CBDT Circular No. 3/2006 dated 27-2-2006, orders of the Co-ordinate Bench of ITAT in MeghSakariya International (supra), Omni Lens Pvt. Ltd. (supra), judgment of the Hon'ble Apex Court in the case of TRF Ltd. (supra), we hereby hold that the business loss claimed by the assessee is allowable u/s 28 of the Act.

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

7.17. In view of our elaborate observations in the facts and circumstances of the instant case and respectfully following the aforesaid judicial precedent relied upon, we hold that the loss arising on account of payment made to NSEL through registered broker towards purchase of commodities (which were never delivered to assessee) , shall be allowable as regular business loss u/s 28 of the Act. We further hold that the said loss cannot be construed as speculative in nature. Accordingly, we do not find any infirmity in the order of the ld CITA in this regard. Accordingly, the Ground Nos. 2 & 3 raised by the revenue in the case of Nirshilp

Securities Private Limited in ITA No. 6321/Mum/2019 for the Asst Year 2014-15 are dismissed.

8. In the result, the appeal of the revenue in ITA No. 6321/Mum/2019 is dismissed.

ITA No.6318/Mum/2019 (A.Y.2014-15) (Dolat Investment Ltd)

9. The grounds raised by the revenue are identical to the Ground Nos. 2 & 3 raised by the revenue in ITA No. 6321/Mum/2019 for the Asst Year 2014-15 in the case of Nirshilp Securities Private Limited and hence the decision rendered thereon would apply with equal force for this assessee also , except with variance in figures.

10. In the result, the appeal of the revenue in ITA No. 6318/Mum/2019 is dismissed.

ITA No.6322/Mum/2019 (A.Y.2016-17) (Nirshilp Securities Pvt. Ltd.,)

11. This appeal in ITA No. 6322/Mum/2019 for A.Y. 2016-17 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-50, Mumbai in appeal No. CIT(A)-50/10214/2018-19 dated 16/07/2019 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 10/12/2018 by the ld. Asst. Commissioner of Income Tax-10(3)(1) / Dy. Commissioner of income Tax-Central Circle 8(1), Mumbai (hereinafter referred to as ld. AO).

12. The first issue to be decided in this appeal of the revenue is as to whether the ld CITA was justified in deleting the addition of Rs

1,34,86,279/- made by the ld AO on account of treating interest income on fixed deposits under the head Income from other sources as against the assessee's claim to be taxed under the head Income from Business.

13. We have heard the rival submissions and perused the materials available on record. We find that the ld CITA had observed that the assessee had received interest of Rs 1,34,86,279/- on the fixed deposits kept with ICICI Bank which was offered to tax by the assessee as business income. This income was sought to be taxed by the ld AO under the head Income from other sources as according to him, the said interest income was not incidental to business. We find that the assessee had pleaded that it had availed Overdraft facility of Rs 13.50 crores against Fixed Deposit of Rs 15 crores from ICICI Bank. We find that the assessee had submitted that it is engaged in trading in shares , securities and commodities and that its business requires availability of the funds when opportunity to earn money arises in the volatile security and commodity market. The timing of opportunity are always unpredictable and therefore liquidity is of an essence for the type of business. Accordingly, the fixed deposit was created with ICICI Bank so that an overdraft facility could be availed against such fixed deposit from the same bank in order to meet the business exigencies. The assessee submitted that this fixed deposit was made admittedly out of business funds of the assessee and for business purposes and accordingly the interest income earned thereon was taxable as business income. It was pleaded that the investment in fixed deposit was therefore inextricably linked with the purpose of the business and therefore interest on fixed deposits would be taxed only as business income. The assessee further submitted that similar treatment given by the assessee was accepted by the ld AO for the Asst Year 2015-16 while completing the scrutiny

assessment u/s 143(3) of the Act. The assessee placed reliance on the following decisions in support of its contentions:-

a) Decision of Mumbai Tribunal in the case of Voltas International Ltd vs ACIT reported in (2010) 2 ITR (Trib) 410

b) Decision of Hon'ble Delhi High Court in the case of CIT vs Koshika Telecom Ltd reported in 287 ITR 479 (Del)

c) Decision of Vishakapatnam Tribunal in the case of VBC Industries Ltd vs DCIT reported in 40 SOT 55

d) Decision of Mumbai Tribunal in the case of Sanchita Marine Products Pvt Ltd vs DCIT reported in 15 SOT 280

e) Decision of Hon'ble Jurisdictional High Court in the case of CIT vs Paramount Premises (P) Ltd reported in 190 ITR 259 (Bom)

f) Decision of Hon'ble Jurisdictional High Court in the case of CIT vs Lok Holdings reported in 189 Taxman 452 (Bom)

13.1. We find that the ld CITA duly appreciated all the contentions of the assessee together with the various case laws relied upon including the decisions of Hon'ble Jursidictional High Court as stated supra. Apart from that, the ld CITA also relied on the following decisions to grant relief to the assessee:-

a) Decision of Hon'ble Supreme Court in the case of S G Mercantile Corporation P Ltd vs CIT reported in 83 ITR 700 (SC)

b) Decision of Hon'ble Supreme Court in the case of CIT vs D P Sandu Bros, Chembur (P) Ltd reported in 273 ITR 1 (SC)

13.2. We find that the ld CITA had categorically given a finding that the investment in fixed deposit made with ICICI Bank has got an inextricable link with the business activity of the assessee and hence the interest income thereon is required to be taxed only as business income. Moreover, the ld CITA also recorded the fact that the ld AO himself had accepted this fact in Asst Year 2015-16 u/s 143(3) of the Act. With regard to resjudicata in income tax proceedings, we find that the ld CITA

had stated though the principle of resjudicata does not apply to income tax proceedings, but the principle of consistency cannot be given a go by. Reliance in this regard was placed on the decision of *Hon'ble Jurisdictional High Court in the case of CIT vs Gopal Purohit reported in 188 Taxman 140 (Bom) and the decision of Hon'ble Supreme Court in the case of Radhasoami Satsang vs CIT reported in 193 ITR 321 (SC).* Hence we do not find any infirmity in the said order of the ld CITA granting relief to the assessee. Accordingly, the Ground No.1 raised by the revenue is dismissed for the Asst Year 2016-17.

14. The Ground No. 2 raised by the revenue is with regard to deletion made by the ld CITA in respect of disallowance made u/s 14A of the Act read with Rule 8D(2) of the Rules.

14.1. We have heard the rival submissions and perused the materials available on record. We find that the ld AO had stated in his order that the assessee had average investment of Rs 27.83 crores during the year under consideration in exempt income yielding assets, for which no expenses have been disallowed voluntarily by the assessee u/s 14A of the Act. Accordingly, the ld AO directly proceeded to apply the computation mechanism provided in Rule 8D(2) of the Rules and proceeded to make disallowance of Rs 73,08,242/- u/s 14A of the Act in the assessment, without recording any satisfaction in terms of Section 14A(2) read with Rule 8D(1) of the Rules and without even mentioning about the voluntary disallowance of Rs 33,886/- made by the assessee towards demat charges.

14.2. We find that the ld CITA appreciated the fact that the assessee had earned dividend income of Rs 1,52,093/- on investment in Goldman Sachs

Liquid Bees Fund ; dividend and interest on tax free bonds both comprised in stock in trade in the sums of Rs 1,31,65,513.58 and Rs 3,07,08,660/- respectively and had claimed all these income as exempt in the return of income. We find that the ld CITA got into each and every investment made by the assessee together with the details of exempt income derived thereon. The assessee also pleaded before the ld CITA that it is having sufficient own funds in the form of share capital and reserves as on 31.3.2016 and 31.3.2015 at Rs 260.26 crores and Rs 229.55 crores respectively, whereas the corresponding figure of stock in trade of shares & securities were only Rs 160.23 crores and Rs 215.23 crores respectively. Hence it was pleaded that no borrowed funds were utilised for making investment from which exempt income was derived. Reliance in this regard was placed on the decision of Hon'ble Jurisdictional High Court in the case of HDFC Bank Ltd reported in 383 ITR 529 (Bom). It was pleaded before the ld CITA that none of the factual and legal submissions made by the assessee were considered by the ld AO with regard to the impugned issue. We find that the ld CITA gave a categorical finding that the interest free funds available with the assessee company are much more than the value of investments that had actually yielded exempt income to the assessee and hence there cannot be any disallowance of interest under second limb of Rule 8D(2) of the Rules. This factual finding was not controverted by the revenue before us. Hence we do not deem it fit to interfere with the said finding of the ld CITA.

14.3. Moreover, we find that the ld CITA had also recorded a categorical finding that the ld AO had not recorded any objective satisfaction having regard to the books of accounts of the assessee, as to why the claim made by the assessee that no expenditure has been incurred other than

Rs 33,886/- for the purpose of earning exempt income, is incorrect. This objective satisfaction with cogent reasons are required to be recorded in terms of section 14A(2) of the Act read with Rule 8D(1) of the Rules. This issue is no longer res integra by the decision of the Hon'ble Supreme Court in the case of Maxopp Investments reported in 402 ITR 640 (SC) in para 41 thereon. We find that the ld CITA had also granted relief on this count by placing reliance on the decision of Hon'ble Delhi High Court in the case of Eicher Motors Ltd vs CIT reported in 86 taxmann.com 49 (Delhi), on which, we find no infirmity. Hence the Ground No. 2 raised by the revenue is dismissed.

15. The third ground raised by the revenue is with regard to adjustment of brought forward business loss and unabsorbed depreciation of Asst Year 2014-15 against the business income of the assessee during the year under consideration.

15.1. We have heard the rival submissions and perused the materials available on record. We have already held in assessee's own case for the Asst Year 2014-15 in ITA No. 6321/Mum/2019 hereinabove that the business loss of Rs 87.93 crores would be allowable as business loss u/s 28 of the Act. Hence the said loss would be eligible to be carried forward to subsequent years in terms of section 72 and 32 of the Act to be set off with the business income or other income, as the case may be. We find that the ld AO had primarily dismissed the claim of the assessee since he had already disallowed the business loss in Asst Year 2014-15 of Rs 87.93 crores. But the said disallowance has already been deleted by us in Asst Year 2014-15 in ITA No. 6321/Mum/2019 supra. Hence this ground is effectively consequential in nature. The ld AO is hereby directed to allow the set off of losses from Asst Year 2014-15 after giving effect to our

tribunal order for Asst year 2014-15 and whatever loss that is available to the assessee thereafter, should be allowed to be carried forward to subsequent years and allowed to be set off against future business income. Accordingly, the Ground No. 3 raised by the revenue is dismissed.

16. In the result, the appeal of the revenue in ITA No. 6322/Mum/2019 for the Asst Year 2016-17 is dismissed.

17. In the result, all the appeals of the revenue are dismissed.

Order pronounced on 21/06/2021 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(C.N. PRASAD)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 21/06/2021
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai