

**आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत**  
IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT “**SMC**” BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER

**आ.अ.सं./ITA No.717/SRT/2018** (AY 2008-09)

(Hearing in Physical Court)

Shri Manoj Valjibhai Bhayani B-504, Krishna Residency, Laxmikant Ashram Road, Hathi Mandir Road, Katargam, Surat <b>PAN : AFXPB 4423 Q</b>	Vs	Income Tax Officer, Ward-8(3), Aaykar Bhavan, Majura Gate, Surat-395001
<b>अपीलार्थी/ Appellant</b>		<b>प्रत्यर्थी / Respondent</b>

निर्धारित की ओर से /Assessee by	Shri Sapnesh R Sheth
राजस्व की ओर से /Revenue by	Shri J.K. Chandnani, Sr-DR
सुनवाई की तारीख/Date of hearing	02.12.2022
उद्घोषणा की तारीख/Date of pronouncement	06.12.2022

**Order under section 254(1) of Income Tax Act**

**Per PAWAN SINGH JUDICIAL MEMBER;**

1. This appeal by assessee is directed against the order of Id. Commissioner of Income-tax (Appeals)-3, Surat [for short as to “Ld. CIT(A)”] dated 29.08.2018 for assessment year (AY) 2008-09, which in turn arises out an assessment order passed by Assessing Officer under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (‘the Act’) vide order dated 28.03.2014. The assessee has raised the following grounds of appeal:-

*“1. On the facts and circumstances of the case as well as law on the subject, the learned assessing officer has erred in reopening assessment by issuing notice u/s 148 of the I.T Act, 1961.*

*2. On the facts and circumstances of the case as well as law on the subject, the learned Commissioner of Income Tax (Appeals) has erred in partly confirming the action of assessing officer in making addition u/s 69 of the I.T. Act by sustaining addition to the extent of Rs.10,23,600/- as against addition of Rs.21,09,967/- made by ld. assessing officer.*

*3. On the facts and circumstances of the case as well as law on the subject, the learned Commissioner of Income Tax (Appeals) has erred in not allowing set off of Loss of Rs.11,38,332/- incurred by assessee during the year under consideration in derivatives & cash delivery segments against the above addition of Rs.10,23,600/- sustained by learned Commissioner of Income Tax (Appeals).*

*4. It is therefore prayed that above addition made by assessing officer and confirmed by Commissioner of Income-tax (Appeals) may please be deleted.”*

2. Brief facts of the case that assessee is an individual and engaged in the diamond brokerage business in diamond market at Surat. The case of assessee was reopened for assessment year 2008-09 on the basis of information that assessee made a share transaction of Rs.21,09,876/- in Religare Securities Pvt. Limited. On the basis of such information, the Assessing Officer was having reason to believe that income of assessee with regard to share transaction have

not been reported by assessee while filing return of income initially under section 139(1) of the Act. On the basis of such belief, the Assessing Officer after recording reason issued notice under section 148 on 25.03.2013. The Assessing Officer recorded that in response to notice under section 148, no response was made by assessee. The Assessing Officer issued notice under section 133(6) to Religare Securities Pvt. Ltd. for calling information about share transaction. The show cause notice was also issued to the assessee to furnish details regarding share transaction and Assessing Officer recorded that assessee furnished reply along with copy of profit and loss account, balance-sheet, computation of income. During the assessment, the assessee was asked to furnish the information regarding share transaction. The assessee in his reply dated 22.03.2014 submitted that during the relevant period he sold certain machinery and jewellery to different persons to make trading in F&O in Religare Securities Pvt. Ltd. in such trading he used to deposits 10 to 15% of margin as securities amounts and purchased various script of different dates. On each and every time, the assessee was unable to

cash so as per Security Exchange Board of India's guidelines he entered into agreement with Religare Securities Pvt. Ltd. The assessee furnished account statement and copy of all transactions in stock market script-wise details and profit and loss. The reply of assessee was not accepted by Assessing Officer. The Assessing Officer held that assessee failed to furnish copy of transaction with Religare Securities Pvt. Ltd., after taking such view, the assessee was asked to furnish D-mat account for the period 01.04.2006 to 31.03.2007 and 01.04.2007 to 31.03.2008 with Edelweiss Finance Advisory Ltd. The Assessing Officer recorded that required details were not furnished by the assessee. The Assessing Officer treated the entire share transaction of Rs. 21,09,976/- as non-genuine and added to the income of assessee.

3. Aggrieved by the addition in the assessment, the assessee challenged the validity of reopening as well as addition in the assessment. The assessee filed written submission in detail. The written submission of assessee recorded in **para-6** of the assessment order. In his submission, the assessee stated that information and transaction details were called for about six

years back, which is a long period and in the meantime, the script bills were misplaced by assessee, when the information was called by Assessing Officer. The assessee made application to Religare Securities Pvt. Ltd., for providing the details of his share transaction. Such fact was brought to the notice of Assessing Officer vide letter / application dated 20.03.2014, when such details were received and the assessee intended to file before the Assessing Officer, he has passed assessment order under section 143(3). The assessee filed such details along with plea of additional evidence under Rule 46A. The assessee submitted that Assessing Officer added the entire share transaction. On furnishing such details, the Ld. CIT(A) forwarded such details to Assessing Officer for examination and furnishing his remand report. The Assessing Officer furnished his remand report dated 09.10.2015. In the remand report, the Assessing Officer reported that assessee made share transaction in derivatives segment as well as delivery of share. The assessee has shown loss of derivatives segment of Rs.9,69,451/- and in cash (delivery) segments of Rs.1,68,881/-. On verification of statement from 01.08.2007

to 31.03.2008 of Religare Securities Pvt. Ltd, the assessee made aggregate payment of Rs.11,43,400/-. The details on which of checked and different were narrated by Assessing Officer. The Assessing Officer further reported that in the statement from 01.08.2007 to 31.03.2008, the assessee has received several amounts, details of which were compiled by Assessing Officer and reported that assessee received Rs.2,99,400/-. The Assessing Officer further reported that on verification of bank statement, in the RBS bank account No.1171189, the assessee made cash deposits of Rs.4.37 lakh and in other bank account, in RBS bank account No.1302145 the assessee made cash deposits of Rs.2,80,500/-. Thus assessee had deposited total cash of Rs.7,17,500/-.

4. Against remand report, assessee furnished his reply / rejoinder, the contents of which is recorded by Ld. CIT(A) in **para-7.2** of his order, wherein the assessee stated that peak investment during the period is only Rs.10,23,600/-. On profit or loss account transaction in share market from the details furnished by Assessing Officer, the assessee stated that as per

remand report of Assessing Officer final result of profit and loss account are drawn as under:

Segment	Total purchase value (in Rs)	Total sales value (in Rs)	Profit/(Loss) (in Rs)
Cash (Delivery)	67,51,764.83	67,55,358.01	(1,68,881.34)
Derivatives	29,63,88,448.50	29,54,18,997.60	(9,69,450.90)
Total loss			(11,38,332.24)

5. The assessee further stated that against the investment of Rs.10,23,600/- the assessee incurred the loss of Rs.11,38,332/-. Hence, net addition income would be Rs.(-) 1,14,732/- after set of loss. The assessee stated that he has not carried forward any kind of loss in his return of income. The assessee stated that no addition be made against the assessee.
6. The Ld. CIT(A) after considering the remand report of Assessing Officer and the submission of assessee held that assessee paid Rs.11,43,200/- to Religare Securities Pvt. Ltd. and assessee has received Rs.2,99,400/- from Religare Securities Pvt. Ltd. The peak of the same were worked out to Rs.10,23,600/-. Further the assessee made cash deposits of Rs.7,17,500/- in two bank accounts which were utilized for payment to Religare Securities Pvt. Ltd. The assessee indulged in trade of Rs.67,51,675/- for purchase and Rs.67,55,358/-

for sale respectively in delivery segment and derivative segment of Rs.29.54 crores in share. The assessee incurred loss of Rs.1,68,881/- in derivatives cash segment and Rs.9,69,451/- in derivative segments. The Ld. CIT(A) after making aforesaid observation held that the peak investment made to Religare Securities Pvt. Ltd. of Rs.10.23,600/- is to be taxed under section 69 of the Act and such amount is admitted by assessee. However, the assessee requested that loss incurred by assessee be set off against this income. The Ld. CIT(A) held that losses were not shown or claimed for set off in return of income or in return in response to notice under section 148. Hence, the claim of set off at this stage cannot be entertained thereby the Ld. CIT(A) restricted the addition to the extent of Rs.10,23,600/-. Further aggrieved the assessee has filed present appeal before the Tribunal.

7. I have heard the submissions of learned authorised representative (AR) of the assessee and the learned senior departmental representative (DR) for the revenue and have gone through the orders of lower authorities.



8. At the outset of hearing the ld AR for the assessee submits that he is not pressing Ground No.1 which relates to validity of reopening. The Ld. AR for the assessee submits that Ground No.2 relates to partial sustaining the addition and Ground No.3 relates to not allowing set off of losses suffered by assessee during the year under consideration in derivatives and cash delivery segments against the addition sustained by Ld. CIT(A). The Ld. AR for the assessee submits to cut short the controversy, though no addition, even to the extent of Rs.10,23,600/- is liable to be sustained, yet the assessee made a limited prayer that if loss of current year is directed to be set off against the cash delivery segment the assessee would not pressed for any other ground. The Ld. AR for the assessee further submits that it is an admitted position under law that where the Assessing Officer made addition of some amount to the assessee's income as income from undisclosed sources under section 69, the claim of loss for set off to be allowed. To support his contention, the Ld. AR for the assessee relied upon the decision of Delhi Tribunal in the case of Rajendra Kumar Anand vs. Income Tax Officer [2022] 140

taxmann.com 340 (Delhi-Trib.) [25.05.2022] and Hon'ble jurisdictional High Court in the case of Commissioner of Income-tax-II Vs. Shilpa Dyeing & Printing Mills (P.) Ltd., [2013] 39 taxmann.com 3 (Guj) [2013] 219 Taxman 279 (Guj) [04-04-2013]. The Ld. AR for the assessee submits that Hon'ble jurisdictional High Court in the case of Shilpa Dyeing & Printing Mills (P.) Ltd., (supra) held that once the loss is determined, the same should be set off against the income determined under any other head of income including undisclosed income.

9. On the other hand, Ld. Senior Departmental Representative (Sr-DR) for the Revenue submits that assessee neither in his computation of income nor before Assessing Officer raised such plea about set off loss and such losses were claimed for the first time before Ld. CIT(A) and Ld. CIT(A) after considering the submissions of assessee clearly held that such claim cannot be entertained at this stage.
10. I have considered the rival submission of the both parties and gone through the orders of lower authorities carefully. I find that there is a very limited dispute before me, whether the

assessee eligible for claiming set off loss of Rs.11,38,332/-. I find that before Assessing Officer, during the remand proceedings the assessee accepted that the assessee has suffered losses in share transaction of Rs.9,69,451/- in derivative segment and Rs.1,68,881/-in cash delivery segment. The Ld. CIT(A) upheld the addition to the extent of peak investment. On the plea of assessee that assessee be allowed set off loss, the Ld. CIT(A) held that such claim cannot be entertained at this stage. In my view, though the Assessing Officer is not entitled to admit or entertain additional claim during the assessment proceedings, however the appellate authority has such jurisdiction to admit such additional claim as has been held by Hon'ble jurisdictional High Court in the case of CIT Vs. Mitesh Impex (2014) 367 ITR 85 (Guj). Thus, I admit the additional plea of set off of loss of current year against the income of assessee in the impugned year.

11. So far as merit is concerned, the Hon'ble jurisdictional High Court in the case of Shilpa Dyeing & Printing Mills (P.) Ltd., (supra) held that once the loss is determined, the same should be set off against the income determined under any other head

of income including undisclosed income. I further find that similar views taken by Division Bench of Hon'ble Delhi Tribunal in the case of Rajendra Kumar Anand (supra), wherein it was held that when Assessing Officer made addition of certain amount to income of assessee from undisclosed sources taxable under section 69 claim of set off loss is to be allowed.

12. Considering the aforesaid factual and legal position, I direct the Assessing Officer to verify the facts and allow the set off loss suffered by assessee against addition of undisclosed income. Thus, the Ground No.3 raised by assessee is allowed in above terms.
13. Further, considering the fact that I have allowed ground No.3 of assessee's appeal, the ground No.2 raised by assessee has become infructuous. As recorded above, the ld. AR for the assessee has already made a statement that he is not to pressing ground No.1. Hence, ground No.1 raised by assessee is dismissed being not pressed.
14. In the result, the appeal of the assessee is partly allowed in above terms.

Order pronounced in the open court on 06 /12/2022.

**Sd/-**  
**(PAWAN SINGH)**

**[न्यायिक सदस्य JUDICIAL MEMBER]**

सूत /Surat, Dated: 06/12/2022

*Dkp. Out Sourcing Sr.P.S*

Copy to:

1. Appellant-
2. Respondent-
3. CIT(A)-
4. CIT
5. DR
6. Guard File

By order

// True Copy //

Sr.P.S./Assistant Registrar, ITAT, Surat