

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'आई' मुंबई।

**IN THE INCOME TAX APPELLATE TRIBUNAL "I"
BENCH, MUMBAI**

सर्वश्री नरेन्द्र कुमार बिल्लैय्या, लेखा सदस्य एवं अमित शुक्ला, न्यायिक
सदस्य के समक्ष

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER &
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No. 4798/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2009-10)

IVF Advisors Private Limited, Suite F9C, Grand Hyatt Plaza, Santacruz (East), Mumbai - 400 005	बनाम/ Vs.	The Asstt. Commissioner of Income Tax, Range 10(1), Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCI 5623F		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/ Appellant by:	S/Shri Kanchan Kaushal, Dhanesh Bafna & Ms. Chandni Shah
प्रत्यर्थी की ओर से/Respondent by:	Shri Asghar Zain V.P

सुनवाई की तारीख / Date of Hearing :09.02.2015

घोषणा की तारीख /Date of Pronouncement :13.02.2015

आदेश / O R D E R

PER N.K. BILLAIYA, AM:

This appeal by the assessee is preferred against the order of Ld. CIT(A)-21, Mumbai dated 16/4/2012 and pertaining to assessment year 2009-10. The grievance of the assessee read as under:

“On the facts and circumstances of the case, and in law, the learned CIT(A) ought to have held that clause (d) of the proviso to section 43(5) of the Income Tax Act, 1961 (‘the Act’), was applicable to the transactions in foreign currency futures entered into by the appellant and therefore that the loss from these transactions was not in the nature of speculation loss.”

2. Briefly stated, the facts of the case are that the assessee is an Investment Management Consultant. The return for the year was filed on 25/09/2009 declaring total income at Rs.Nil. The return was selected for scrutiny assessment. Statutory notices were issued and served upon the assessee.

3. While perusing the profit and loss account of the assessee, the AO noticed that the assessee has claimed a loss of Rs.93,63,235/- on account of loss on foreign currency futures. The AO was of the strong belief that the loss cannot be allowed in the light of the provisions of section 43(5) of the Income Tax Act, 1961 (the Act) r.w. clause (ac) of section 2 of the Securities Contracts (Regulation) Act 1956. While disallowing the loss of Rs.93,63,235/-, the AO has considered the relevant provisions of section 43(5) of the Act and section 2(ac) of the Securities Contracts (Regulation) Act.

4. Aggrieved by this finding of the AO the assessee carried the matter before Ld. CIT(A). It was strongly contended that the contracts in foreign currency futures were not speculative transaction. It was further explained that the foreign currency contract does not satisfy the condition of being a speculative transaction and, therefore, the loss on account of foreign currency futures was not speculative loss. After considering the facts and the submissions, Ld. CIT(A) observed that the

assessee is not engaged in manufacturing or merchanting business and was also a dealer and investor in stock and shares. Therefore, the loss of Rs.93,63,235/- earned by the assessee on account of transactions in foreign currency future was not in the nature of hedging loss, therefore, such loss was not earned in the course of guarding against loss through future price fluctuation in respect of contracts for actual delivery of goods manufactured or in respect of stock of share entered into by a dealer. Ld. CIT(A) was of the firm belief that proviso (d) to section 43(5) was not applicable. Ld. CIT(A) confirmed the assessment order holding that the AO has correctly held that such loss was a speculation loss within the meaning of section 43(5) of the Act. Aggrieved by this assessee is before us.

5. Ld. Counsel for the assessee reiterated what has been submitted before lower authorities. Ld. Counsel for the assessee drew our attention to proviso (d) of section 43(5) of the Act and stated that the Revenue Authorities have failed to interpret the said proviso. It is the say of the Ld. Counsel that the contracts entered by the assessee cannot be said to be of speculative in nature because the contracts have ultimately been settled by the delivery of Forex.

6. Per contra , Ld. DR strongly supported the order of Ld. CIT(A).

7. We have carefully perused the orders of the Revenue Authorities and the submissions made by the assessee in the light of the relevant provisions of the IT Act and also Securities Contract Regulation Act, 1956. Section 43(5) of the I.T. Act read as under:

“(5) 32"speculative transaction" means a transaction in which a contract for the purchase or sale of any commodity³³, including stocks and shares, is periodically or ultimately settled³³ otherwise than by the actual delivery³³ 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 236 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognised stock exchange;[or]

(e) an eligible transaction in respect of trading in commodity derivatives carried out in a recognized 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.

[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 238 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and which fulfils such conditions as may be prescribed and notified³⁹ by the Central Government for this purpose;]

[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 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.

(iii) “recognized association” means a recognized association as referred to in clause (j) of section 2 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”

Proviso (d) excludes the transaction from the definition of speculative transaction in respect of trading of derivatives referred to in section 2(ac) of the Securities Contract (Regulation) Act, 1956 carried in recognized stock exchange. Section 2(ac) of the Securities Contract (Regulation) Act, 1956 read as under:

“ 2.[ac] “*derivative*” includes—

(A) *a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security;*

(B) *a contract which derives its value from the prices, or index of prices, of underlying securities;]*”

7.1 Thus, it can be seen that the derivatives also includes securities. The definition of eligible transaction mentioned herein above clearly show that the transaction must have been carried out electronically in accordance with the provisions of Securities Contracts (Regulation) Act and the Rules and Regulations or bye laws made or directions issued under this Act or by banks or mutual funds on a recognized stock exchange and which is supported by time stamped contract note issued by such stock broker or sub-broker or intermediary to every client indicating in the contract note the unique client identity number and permanent account number.

7.2 It would be pertinent to consider the decision of Hon'ble Madras High Court in the case of Rajshree Sugar & Chemicals Ltd. vs. Axis Bank Ltd., AIR 2011 (Mad) 144, wherein the term derivative has been defined to include foreign currency as an underlying security of the derivative. The relevant extract of the case is quoted below:

“What are these derivatives which have gained such a great deal of notoriety? In simple terms, derivatives are financial instruments

whose values depend on the value of other underlying financial instruments. The International Accounting Standard (IAS) 39, defines “derivatives” as follows: -

“A derivative is a financial instrument:

(a) whose value changes in response to the change in a specified interest rate, security price, commodity price, foreign exchange rate, index of prices or rates, a credit rating or credit index, or similar variable (sometimes called the ‘underlying’);

(b) that requires no initial net investment or little initial net investment relative to other types of contracts that have a similar response to changes in market conditions; and

(c) that is settled at a future date.”

Actually, derivatives are assets, whose values are derived from values of underlying assets. These underlying assets can be commodities, metals, energy resources, and financial assets such as shares, bonds, and foreign currencies.”

7.3 Further, the SEBI website in its section ‘frequently asked questions’ has explained the meaning of derivative as under:

Q 1. What are Derivatives?

A. The term “Derivative” indicates that it has no independent value, i.e. its value is entirely “derived” from the value of the underlying asset. The underlying asset can be securities, commodities, bullion, currency, live stock or anything else. In other words, Derivative means a forward, future option or any other hybrid contract of pre determined fixed duration, linked for the purpose of contract fulfillment to the value of a specified real or financial asset or to an index of securities.

With Securities Laws (Second Amendment) Act, 1999, Derivatives has been included in the definition of Securities. The term Derivative has been defined in Securities Contracts (Regulations) Act, as:

A Derivative includes: -

a. a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security;

b. a contract which derives its value from the prices, or index of prices, of underlying securities;

It is further provided by SEBI that in Aug.2008 SEBI permitted exchange traded currency derivative.

7.4 Considering the relevant provisions of the relevant Acts, discussed herein above in the light of Hon'ble Madras High Court and the answers given to frequently asked questions by the SEBI and the incorporation of exchange traded currency derivative from August, 2008, there remain no iota of doubt that the transaction of the assessee cannot be treated as speculative transaction. We have also gone through the copies of the contract notes incorporated in the paper book filed before us. A perusal of the contract note shows that the assessee has either entered into call option or put option and on the settlement day the transaction has been settled by delivery, either the assessee has paid US dollar on the settlement day or has taken delivery of US dollar.

7.5 To sum up, the derivatives include foreign currency and call option/ put option, are transactions of derivative markets and cannot be termed as speculative in nature. Considering the totality of the facts and in the light of the judicial discussion herein above, we have no hesitation in setting aside the order of Ld. CIT(A). Appeal filed by the assessee is accordingly allowed.

8. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court at the time of hearing on 13th of Feb. 2015.

Sd/-

(AMIT SHUKLA)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(N.K. BILLAIYA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 02.2015

व.नि.स./ VM , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई
/ DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai