IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1804 OF 2017

Pr.Commissioner of Income Tax-14 … Appellant
V/s.
M/s Foods and Inns. Ltd. … Respondent

Mr.Suresh Kumar, Advocate for the Appellant.
Mr.Ajay Kumar Singh with Mr.Ravindra Poojary, Advocate for the Respondent.

CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.
DATE : JANUARY 22, 2020

P.C.:-

1. Heard Mr.Suresh Kumar, learned standing counsel, Revenue for the appellant; and Mr.Ajay Kumar Singh, learned counsel for the respondent-assessee.

2. This appeal under Section 260A of the Income Tax Act, 1961 (briefly "the Act" hereinafter) has been preferred by the Revenue against the order dated 7th June, 2016 passed by the Income Tax Appellate Tribunal, "F" Bench, Mumbai (briefly "the Tribunal" hereinafter) in Income Tax Appeal No.6271/Mum/2014 together with Cross-Objection No.34/Mum/2016 for the assessment year 2010-11.

3. The appeal has been preferred on the following question which is contended to be a substantial question of law:-

> "Whether, on the facts and circumstances of the case and in law, the Tribunal is correct in law in deleting the disallowance of loss of foreign exchange by holding that the same is not speculative loss but is allowable as business loss?"

4. In the assessment proceeding which culminated in the assessment order dated 25th March, 2013 passed by the Assessing Officer under Section 143(3) of the Act, loss of foreign exchange of Rs.6,53,06,057.00 was held to be a speculative loss and the said amount was accordingly disallowed and added to the total income of the assessee.

5. Aggrieved by the aforesaid, assessee preferred appeal before the Commissioner of Income Tax (Appeals), Mumbai contending that the aforesaid amount was not a speculative loss but a loss incurred in the course of business. By the order dated 16th July, 2014, the first appellate authority accepted the contention of the assessee and directed deletion of such disallowance.

6. Revenue thereafter preferred further appeal before the Tribunal. While dismissing the appeal of the revenue vide the order dated 7th June, 2016, Tribunal held that the aforesaid loss could not be construed as speculative loss and in this connection relied upon a decision of this court in **Commissioner of Income Tax VS. Badridas Gauridu (P.) Ltd., (2003)261 ITR 256(Bom)**.

7. Aggrieved, present appeal has been preferred on the aforesaid question.

8. Submissions made by learned counsel for the parties have been considered.

9. At the outset, we may advert to the finding recorded by the Tribunal in the order dated 7th June, 2016 which is as under:-

> "5.3.1 We have heard the rival submissions and perused and carefully considered the material on record, including the judicial pronouncements referred to in the orders of the authorities below. From the fact on record, it is not disputed that the assessee is engaged in the manufacture and export of processed food products such as fruit pulp and other allied items, for which it was receiving export sales proceeds from abroad in foreign exchange currencies. We find from the record that the learned CIT (A), after examination of the matter, found that the assessee had

entered into foreign exchange forward contracts with banks only to safeguard itself and hedge against the exposure risks in future fluctuation in the exchange rates of foreign currency to be received by it as export sale proceeds. It is seen that these foreign exchange forward contracts entered into with banks from time to time in the relevant periods under consideration, were made against confirmed export orders and export of goods by the assessee.

5.3.2 In our view the AO's findings to the contrary that the aforesaid foreign exchange losses suffered by the assessee are speculative in nature was factually flawed as it was based on a factually incorrect assumption that the assessee not being dealer in foreign exchange, its forward contracts were only for foreign exchange which were settle d without delivery thereof. The RBI has permitted importers and exporters to enter into foreign exchange forward contracts with the banks in respect of its export orders. In the case on hand the assessee entered in to foreign exchange export contracts with banks to the extent of its export orders; which means every foreign exchange forward contract is against a specific export order. In this factual matrix, it is clear that the assessee did not deal in foreign exchange, but entered into foreign exchange forward contract within banks to safeguard itself against possible foreign exchange losses on account of export sale proceeds to be received.

5.3.3 We concur with the view of the learned CIT (A) in the impugned order that the facts and circumstances of the case establish that the proviso (a) to section 43(5) of the Act is squarely applicable in the case on hand since the foreign exchange forward contracts entered into by the assessee with banks, in the course of its manufacturing and export business of fruit pulp and allied items, were in order to safeguard itself against possible future foreign exchange losses on account of exports sale proceeds receivable, due to fluctuation in price of different commodities and which contracts were backed by confirmed export orders for dealing of goods manufactured or traded by it. These transactions were not speculative in nature and the resultant foreign exchange losses were consequently not speculative losses but allowable business losses. Such contracts are directly from the incidental to the assessee's business of manufacture and export of fruit pulp and allied products and therefore, in our view, do not represent speculative transactions.Therefore, the concept of delivery and non-delivery thereof is of no consequence and is irrelevant in the context of the facts of the case on hand. As long as the aforesaid transactions of foreign exchange forward contracts are concerned, they are directly linked with the assessee's business of manufacture and export of fruit pulp and allied items. In our considered view, by no stretch of imagination can they be classified as 'speculative business'.

5.3.4 We find that the issue on hand is squarely covered in favour of the assessee by the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Badridas Gauridu (P) Ltd. (2003)261 ITR 256(Bom):

> "The assessee had entered into forward contracts with the Banks in respect of foreign exchange. Some of these contracts could not be honoured by the assessee for which it had to pay some amount which was debited to the P & L account. The assessee claimed the same as

business loss being payment on account of cancellation of forward booking of forex with the banks in respect of export orders. Finally when the issue came up for consideration the Hon’ble Bombay High Court held as under :-

The assessee was not a dealer in foreign exchange. The assessee was a cotton exporter. The assessee was an export house. Therefore, foreign exchange contracts were booked only as incidental to the assessee’s regular course of business. The Tribunal has recorded a categorical finding to this effect in its order. The Assessing Officer has not considered these facts. Under Section 43(5) of the Income-tax Act, “speculative transaction” has been defined to mean a transaction in which a contract for the purchase or sale of a commodity is settled otherwise than by the actual delivery or transfer of such commodity. However, as stated above, the assessee was not a dealer in foreign exchange. The assessee was an exporter of cotton. In order to hedge against losses, the assessee had booked foreign exchange in the forward market with the bank. However, the export contracts entered into by the assessee for export of cotton in some cases failed. In the circumstances, the assessee was entitled to claim deduction in respect of Rs. 13.50 lakhs as a business loss. This matter is squarely covered by the judgment of the Calcutta High Court, with which we agree, in the case of

CIT V. Soorajmull Nagarmull (1981) 22 CTR Cal)8: (1981) 129 ITR 169 (Cal)".

5.3.5 Taking into account the facts and circumstances of the case as discussed above and the judicial pronouncement referred to (supra), we are of the considered view that the orders of the learned CIT(A) for assessment years 2009-10 and 2010-11 holding that foreign exchange losses of Rs.16,72,65,011/- and Rs.6,53,06,057/- for assessment years 2009-10 and 2010-11 respectively were business losses and directing the AO to allow the same calls for no interference from us and we therefore confirm an uphold the same. Consequently, Revenue's grounds No.1(a) and (b) for A.Y. 2009-10 and ground No. 2 for A.Y. 2010-11 are dismissed."

10. From the above, it is seen that assessee had entered into foreign exchange export contracts with banks to the extent of its export orders. In other words, every foreign exchange forward contract was against a specific export order. Therefore, Tribunal held that assessee did not deal in foreign exchange but had entered into foreign exchange forward contract with banks to safeguard itself against possible foreign exchange losses on account of export sale proceeds to be received.

11. Tribunal concurred with the view taken by the Commissioner of Income Tax (Appeals) that these transactions were not speculative in nature and the resultant foreign exchange losses were consequently not speculated loss but allowable business loss. Such contracts were incidental to the assessee’s business of manufacture and export of fruit pulp and allied products and therefore, did not represent speculative transactions.

12. As referred to and relied upon by the Tribunal, this was also the view taken by this court in **Badridas Gauridu (P.) Ltd.(supra)**.

13. This position has been again reiterated in **Commissioner of Income-Tax Vs. D. Chetan and Company, (2017) 390 ITR 36 (Bom),** wherein it has been held as under:-

> “The impugned order of the Tribunal has, while upholding the finding of the Commissioner of Income-tax (Appeals), independently come to the conclusion that the transaction entered into by the respondent-assessee is not in the nature of speculative activities. Further the hedging transactions were entered into so as to cover variation in foreign exchange rate which

would impact its business of import and export of diamonds. These concurrent finding of facts are not shown to be perverse in any manner. In fact, Assessing Officer also in the assessment order does not find that the transaction entered into by the respondent-assessee was speculative in nature. It further holds that at no point of time did the Revenue challenge the assertion of the respondent-assessee that the activity of entering into forward contract was in the regular course of its business only to safeguard against6 the loss on account of foreign exchange variation. Even before the Tribunal, we find that there was no submission recorded on behalf of the Revenue that the respondent-assessee should be called upon to explain the nature of its transactions. Thus, the submission now being made is without any foundation as the stand of the assessee on facts was never disputed. So far as the reliance on Accounting Standard 11 is concerned, it would not by itself determine whether the activity was a part of the respondent-assesee’s regular business transaction or it was a speculative transaction. On present facts, it was never the Revenue’s contention that the transaction was speculative but only disallowed on the ground that it was notional. Lastly, the reliance placed on the decision in S. Vinodkumar (supra) in the Revenue’s favour would to by itself govern the issues arising herein. This is so as every decision is rendered in the context of the facts which arise before the authority for adjudication. Mere conclusion in favour of the Revenue in another case by itself would not entitle a party to have an identical relief in this case. In fact, if the Revenue was of the view that the facts in S. Vinodkumar (supra) are identical/similar to the present facts, then reliance would have been placed by the

> Revenue upon it at the hearing before the Tribunal. The impugned order does not indicate any such reliance. It appears that in S. Vinodkumar (supra), the Tribunal held t hat forward contract on facts before it to be speculative in nature in view of section 43(5) of the Act. However, it appears that the decision of this court in CIT v. Badridas Gauridu P. Ltd.(2003)261 ITR 256(Bom); (2004) 134 Taxman 376(Bom) was not brought to the notice of the Tribunal when it rendered its decision in S. Vinodkumar (supra). In the above case, this court has held that forward contract in foreign exchange when incidental to carrying on business of cotton exporter and done to cover up losses on account of differences in foreign exchange valuations, would not be speculative activity but a business activity."

14. Recently, this court had dismissed the appeals preferred by the Revenue in **Principal Commissioner of Income-Tax-3 Vs. Jindal Drugs Ltd., Income Tax Appeal Nos.1517, 1545 and 1642 of 2016 decided on 17th February, 2018** and **Principal Commissioner of Income Tax-5 Vs. M/s M. Suresh and Company, Pvt. Ltd., Income Tax Appeal No.1607 of 2016 decided on 23rd January, 2019,** wherein similar point was urged by the Revenue.

15. Following the above, we do not find any merit in the appeal. No question of law arises from the impugned order of the Tribunal.

16. Consequently, the appeal is dismissed. No cost.

(MILIND N. JADHAV, J.) **(UJJAL BHUYAN, J.)**

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