

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.7.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI

AND

THE HON'BLE MR.JUSTICE KRISHNAN RAMASAMY

T.C.A.No.818 of 2016

M/s.Capricorn Food Products India Ltd.,
New No.AH-11/Old No.AH-216,
2nd Street, 8th Main Road,
Shanthi Colony, Anna Nagar,
Chennai 600 040.
PAN: AABCC 1550 B

Appellant

vs

The Assistant Commissioner of Income Tax
Company Circle-I(3), Chennai.

Respondent

Prayer : Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, 'B' Bench, Chennai dated 27.5.2016 in I.T.A.No.2179/Mds/2015, preferred against the order of the commissioner of Income Tax(Appeals)-I, Chennai, dated 03.08.2015, made in I.T.A No.346/2011-12/AI (New No.I.T.A.48/CTI (A)-1/2011-12), against the order of the Assistant Commissioner of Income Tax, Company Circle -I(3), Chennai-34, dated 15.12.2011 made in PAN No.AABCC1550B for the Assessment Year 2009-10.

For Appellant : Mr.G.Baskar

For Respondent : Mr.T.Ravikumar,
Senior Standing Counsel

ORDER

(Made by Dr.Vineet Kothari,J)

The Court was held by Video Conference, as per the Resolution of the Full Court dated 3 July 2020, by Judges at their respective residences and the counsel, staff of the Court appearing from their respective residences.

2. The present Appeal has been filed by the Assessee M/s.Capricorn Food Products India Limited raising the following purported substantial questions of law calling in question the correctness of the order passed by the Income Tax Appellate Tribunal, 'B' Bench, Chennai, dated 27.5.2016 in I.T.A.No.2179/Mds/2015, for the Assessment Year 2008-2009:-

"(i) Whether the order of the Tribunal is sustainable in law as it suffers from serious inconsistencies and illegalities?

(ii) Whether the Tribunal is right in law in summarily disposing of the appeal without advertting to the detailed submissions made, facts and figures placed before it without applying its mind in a judicious manner?

(iii) Whether the Tribunal is right in law in giving certain directions to the Assessing Officer while setting aside the assessment without noticing the fact that the loss claimed in respect of the case of Aishwaria & Co is from derivative trading whereas the loss in the present case is on account of hedging of foreign currency receivable from exports?

(iv) Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal is right in law in directing the Assessing Officer that only the transactions which are completed are to be considered for the purpose of determining the business loss from these foreign exchange forward contract?"

3. The operative part of the Order of the learned Tribunal clearly shows that the matter has only been remanded to the Assessing Authority with similar directions given by the Tribunal in its earlier decision in the case of Aishwarya & Company Private Limited in I.T.A.No.860/Mds/2014, as given in para 8 of its order.

4. The said para 8 including the extract from the order of the Tribunal in Aishwarya & Company Private Limited is quoted below for ready reference:-

" 8. We have heard both the parties and perused the material on record. In our opinion, the issue in dispute was considered by this Tribunal in the case of M/s.Aishwarya & Co. P. Ltd., in ITA No.860/Mds/2014 vide order dated 29.05.2015 wherein the followed the decision of Calcutta High Court in the case of M/s.Baljit Securities Pvt. Ltd. (88 CCH 313) and held as under:

"Clause (d) of Section 43(5) became effective with effect from 1st April, 2006.

Therefore, prior to 1st April, 2006 any transaction in which a contract for the purchase or sale of any commodity including stocks and shares was periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrip was a speculative transaction. Sub-section 1 of Section 73 provides as follows:

'(1) Any loss, computed in respect of a speculation business carried on by the assessee, shall not be set off except against profits and gains, if any, of another speculation business.'

The resultant effect was that any loss arising out of speculative transaction could only have been set off against profits arising out of speculative transaction. In the present case, the assessee, as already indicated, has been dealing in shares where delivery was in fact taken and also in shares where delivery was not ultimately taken. In other words, the assessee has been dealing in actual selling and buying of shares as also dealing in shares only for the purpose of settling the transaction otherwise than by actual delivery. The question arise whether the losses arising out of the dealings and transaction in which the assessee did not ultimately take delivery of the shares or give delivery of the shares could be set off against the income arising out of the dealings and transactions in actual buying and selling of shares. An answer to this question is to be found in the explanation appended to Section 73 which reads as follows:

'Explanation: where any part of the business of a company other than a company whose gross total income consists mainly of income which is chargeable under the heads "interest on securities", or a company the principal business of which is the business of banking or the granting of loans and advances) consists in the purchase and sale of shares of other companies, such company shall, for the purposes of this

section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase. In order to resolve the issue before us, the section has to be read in the manner as follows:

"Explanation : Where any part of the business of a company (..... ..) consist in the purchase and sale of shares of other companies, such company shall, for the purposes of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares.

It would, thus, appear that where an assessee, being the company, besides dealing in other things also deals in purchase and sale of shares of other companies, the assessee shall be deemed to be carrying on a speculation business. The assessee, in the present case, principally is a share broker, as already indicated. The assessee is also in the business of buying and selling of shares for self where actual delivery is taken and given and also in buying and selling of shares where actual delivery was not intended to be taken or given. Therefore, the entire transaction carried out by the assessee, indicated above, was within the umbrella of speculative transaction. There was, as such, no bar in setting off the loss arising out of derivatives from the income arising out of buying and selling of shares. This is what the learned Tribunal has done.

9. From the above decision of the Calcutta High Court in the case of Baljit Securities Pvt. Ltd. cited supra, the issue stands covered in favour of the assessee. However, we make it clear that total transaction considered for determining this business

loss from derivative transactions cannot be more than the total export turnover of the assessee for the assessment year under consideration and if the derivative transaction is in excess of export turnover, then that loss suffered in respect of that portion of excess transactions to be considered as speculative loss only as that excess derivative transaction has no proximity with export turnover and the Assessing Officer is directed to compute accordingly. This ground is allowed as indicated above.

5. Further, the Mumbai Bench of ITAT in the case of Araska Diamond P. Ltd vs ACIT, 152 ITD 203, has held as under:

"Total sales during the year amounted to 27.78 crores, that The AO and the FAA had held such transaction were speculative in nature and had disallowed the claim made by the assessee, that the assessee was of the opinion that transactions entered into by it were not speculative transactions. ITAT found that the amount involved in the forward contract(FC) was more than 100% of the turnover of the assessee, that FC were not relatable to specific bills, that the assessee had not related any single bill to any of the contract and had not provided any purchase order during the assessment or appellate proceedings. ITAT found that in the case under consideration assessee was not dealing in Foreign Exchange, therefore transactions entered into by it in Foreign Exchange cannot be held to be hedging transactions. As the assessee was dealing in diamonds and FC entered into only for diamonds would have been covered by the proviso (a) to the section 43(5) of the Act. As held by the Hon'ble High Court of Calcutta in the matter of Gourepore Co. Ltd, onus was on the assessee to prove that the transactions in question were not of a speculative nature. ITAT was of the opinion that it had failed to discharge the onus cast upon him by the statute. It was also

not able to contradict the finding of fact that booking and cancellation of FC of foreign exchange were not in respect of specified export or import. Besides, finding of fact given by the Revenue Authorities remained un-contravened that loss in question shown by it pertained to those FC transactions, against which no actual delivery of foreign exchange was made. On appreciation of the facts surrounding the transaction ITAT had reached at the conclusion that transactions entered in to by the assessee were speculative in nature and the case of the assessee is not covered by proviso(a) of the section 43(S) of the Act. Disputed transactions were speculative and not hedging transaction, that the assessee could not relate any single bill to any of the contract and it had not provided detail of any purchase order relatable to specific transaction, during the assessment or appellate proceedings. Thus, the transactions undertaken by it have to be taken as transactions relatable to Foreign Exchange. ITAT was of the opinion that the order of the FAA does not suffer from any legal or factual infirmity. Therefore, considering the peculiar facts and circumstances of the case, ITAT confirmed his order FAA and decide effective ground against the assessee."

6. In view of the above orders of the Tribunal, we are of the opinion that the Assessing Officer has to consider the foreign exchange derivative in proportion to export turnover as regular business transaction of the assessee. If the derivative transaction undertaken by the assessee is in excess of export turnover then that loss suffered in respect of that portion of excess transaction has to be considered as speculative loss only and that excess derivative transaction has no proximity with export turnover and the Assessing Officer is directed to compute accordingly. Further, the Assessing Officer has to see whether there is any premature cancellation of forward contract of foreign exchange and that transaction should be taken out for the purpose of considering the

business loss and only the transactions which are completed to be considered for the purpose of determining the business loss from these foreign exchange forward contract. With this observation, we remand this issue to the file of the Assessing Officer for fresh consideration.

7. Before us, the ld. Representative relied on the judgment of Gujarat High Court in CIT vs Friends and Friends Shipping P. Ltd, [2013J 217 Taxman 267, for the proposition that if the assessee failed to take delivery within the period indicated in contract and the assessee had given instructions to bank for cancellation of contract on payment of agreed charges to the bank these transactions cannot be considered as speculative transaction. However, there is no finding in this judgment towards this effect and the reliance placed by the assessee is misplaced. More so, this issue was considered by the Mumbai Tribunal while delivering the decision in the case of Araska Diamond P. Ltd, 152 1TD 203, and after following the judgments of Calcutta High Court in the case of Bengal & Assam Co. Ltd vs CIT 227 CTR 399, and Bombay High Court judgment in the case of CIT vs Badridas Gauridu P. Ltd 261 ITR 256, the Tribunal came to the conclusion that the transactions, which were prematurely cancelled, cannot be considered as business transaction and it is to be considered as speculative transaction. In view of the above, we are inclined to remit the issue back to the file of the Assessing Officer for fresh consideration."

In view of this, we are remitting the issue in dispute to the file of AO on similar direction. Hence, the appeal of assessee is partly allowed for statistical purposes.

9. In the result, both the appeals of the Revenue and the assessee are partly allowed for statistical purposes.

5. Mr.G.Baskar, learned counsel for the Appellant/Assessee submitted that while remanding the case to the Assessing Authority, the Tribunal has given certain directions and its

views about the Exchange Fluctuations to be treated as speculative loss or business loss and therefore, it is not an open remand which is likely to prejudice the case of the Assessee while the Assessing Authority passes a fresh order upon such remand.

6. The learned Senior Standing Counsel Mr.T.Ravikumar appearing for the Respondent/Revenue has not seriously objected to the Assessing Authority passing fresh orders in accordance with law.

7. Therefore, we do not find any substantial question of law to be arising in the present case at this stage, requiring our consideration or pronouncement on the merits of the case, since the matter has only been remanded to the Assessing Authority.

8. However, we make it clear that the objections of the Assessee shall be kept open and the Assessee will be free to rely upon the relevant materials including the later case laws, if any, delivered on this issue in various High Courts.

9. The Assessing Authority may proceed to pass fresh orders, uninfluenced by any observations made by the Tribunal in the above quoted portion of its previous order as well as the present order of the learned Tribunal.

10. With these observations, the Appeal is disposed of without answering the questions of law at our end. No order as to costs.

Sd/-

Assistant Registrar

//True Copy//

सत्यमेव जयते Sub Assistant Registrar

Ssk/kpl

To

1.The Income Tax Appellate Tribunal,
B Bench, Chennai.

2.The Commissioner of Income Tax(appeals)-I,
Chennai.

3.The Assistant Commissioner of Income Tax
Company Circle -I(2), Chennai-34.

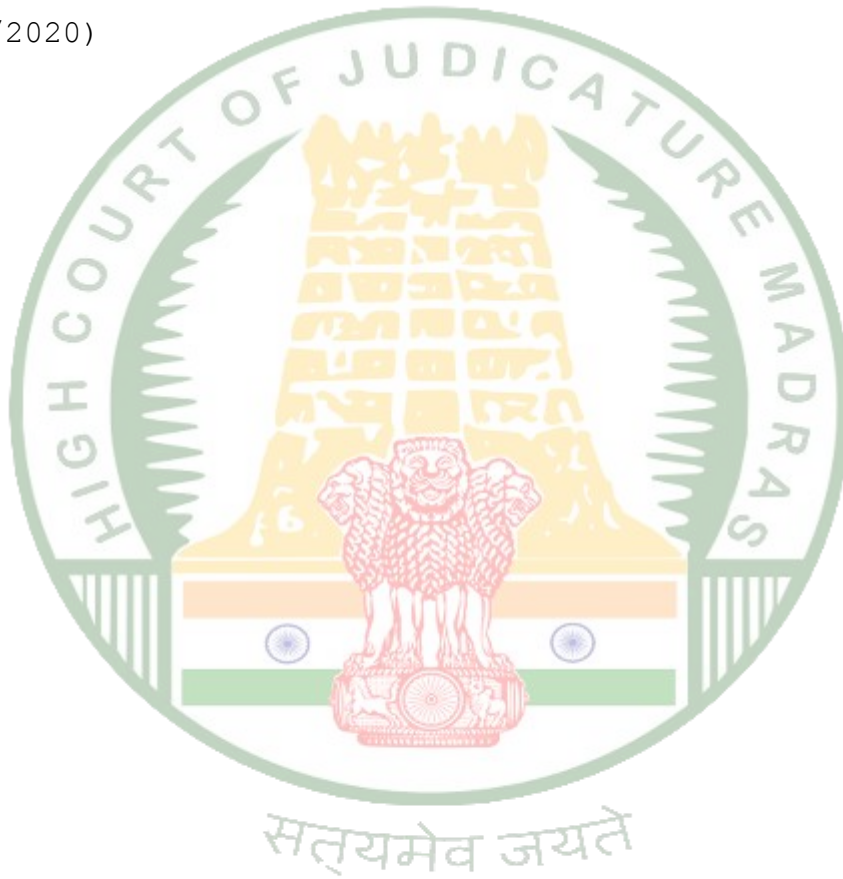
+1 cc to M/s.G.Baskar, Advocate Sr.No. 25117

+1 cc to M/s.T.Ravikumar, Advocate Sr.No. 25119

T.C.A.No.818/2016

SSV(CO)

RMP (02/11/2020)



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