

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

INCOME TAX APPEAL NO. 79 OF 2018

Souvenir Developers (I) Pvt. Ltd.
Shop No. 1, Animesh Apartment,
Plot No. 3, Janki Nagar,
Wadibhokar Road, Deopur,
Dhule-424 002.

.... Appellant.

Versus

The Union of India
Through Assistant Commissioner
of Income Tax, Circle-3(1), Dhule.

.... Respondent.

Mr. S. P. Shah, Advocate for appellant.

Dr. Kalpalata Bharaswadkar-Patil, Advocate for respondent.

...

**CORAM : R. D. DHANUKA &
S. G. MEHARE, JJ.**

Date on which reserved for judgment : 20th April, 2022.

Date on which judgment pronounced : 06th May, 2022.

JUDGMENT : [PER R. D. DHANUKA, J.] :-

1. The appeal by the assessee under section 260-A of the Income Tax Act, 1961 raises the following substantial questions of law :-

(i) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in confirming any addition on

transaction in derivatives on recognized stock exchange as defined under Section 43 (5) (d) of the Income Tax Act, 1961 with reference to explanation given to Section 73 of the Income Tax Act, 1961 which is applicable to speculative transactions.

(ii) Whether loss suffered by the appellant on the transactions in respect of trading in derivatives referred to in clause (ac) of Section 2 of the Securities Contracts (Regulation) Act, 1956 carried out in a recognized stock exchange by the appellant could have been set off against the income of the appellant arisen out of infrastructure business carried on by the appellant under Section 70 of the Income Tax Act, 1961.

2. By consent of parties appeal is heard finally. Some of the relevant facts for the purpose of deciding this appeal are as under :-

The relevant assessment year is 2009-10 and financial year is 2008-09. The appellant is a domestic company and derives income from business.

The appellant is dealing in collection of Toll fees in the name and style "M/s. Souvenir Developer (India), Pvt. Ltd., Dhule". The appellant is also carrying business of shares and derivatives. The return of income declaring total income of Rs.85,43,220/- was

submitted electronically by assessee on 30th September 2009. The same was processed on 28th March 2011 under section 143 (1) of the Income Tax Act, 1961 by accepting the return of income. Subsequently the case of the appellant was picked up for scrutiny. The statutory notice under section 143(2) of the Income Tax Act, 1961 was issued on 28th September 2010. The appellant was granted an opportunity of being heard by the assessing officer. The appellant produced the information called as per questionnaire before the assessing officer. The assessing officer passed order on 29th December 2011 assessing the income of the appellant as Rs.90,79,092/-.

3. In the said assessment order, the assessing officer made addition of the income to the extent of Rs.5,35,872/- under three different heads. The assessing officer refused to consider the loss suffered by the assessee on transaction in derivatives while computing net taxable income. The application for rectification under section 154 made by the appellant was rejected by order dated 14th May 2012. On 4th June 2012 the appellant preferred an appeal before the Commissioner of Income Tax (Appeals) against the assessment order. The appellant did not challenge the additions made by the Assessing Officer.

4. On 27th February 2014, the Commissioner of Income Tax (Appeals) passed order refusing to consider the loss suffered by the appellant on transaction in derivatives while computing the net income of the appellant. The Commissioner of Income Tax (Appeal) was of the view that the appellant would not be entitled to set-off loss suffered from transactions in securities because of the provisions of section 73. The Commissioner held that as provided under section 73, the loss suffered by the assessee would be a loss from speculative business and as such the appellant would not be entitled to claim set-off against the income from a non-speculative business.

5. Being aggrieved by the said order, the appellant preferred an appeal before the Income Tax Appellate Tribunal on 2nd July 2014. On 31st October 2017 the Income Tax Appellate Tribunal dismissed the said appeal. The Income Tax Appellate Tribunal was of the view that the appellant would not be entitled to claim set-off in view of the provisions of Section 73.

Being aggrieved by the said decision of the Income Tax Appellate Tribunal, the appellant has preferred this appeal under section 260-A of the Income Tax Act, 1961.

6. Some of the relevant provisions for deciding this appeal

are extracted as under :-

Definitions of certain terms relevant to income from profits and gains of business or profession.

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 purpose of this clause :

(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 recognized stock exchange; or

Explanation 1. — For the purposes of clause (d), 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) "recognized stock exchange" means a recognized 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 [79](#) by the Central Government for this purpose;

Set off of loss from one source against income from another source under the same head of income.

70. (1) Save as otherwise provided in this Act, where the net result for any assessment year in respect of any source falling under any head of income, other than "Capital gains", is a loss, the assessee shall be entitled to have the amount of such loss set off against his income from any other source under the same head.

(2) Where the result of the computation made for any assessment year under sections 48 to 55 in respect of any short-term capital asset is a loss, the assessee shall be entitled to have the amount of such loss set off against the income, if any, as arrived at under a similar computation made for the assessment year in respect of any other capital asset.

(3) Where the result of the computation made for any assessment year under sections 48 to 55 in respect of any capital asset (other than a short-term capital asset) is a loss, the assessee shall be entitled to have the amount of such loss set off against the income, if any, as arrived at under a similar computation made for the assessment year in respect of any other capital asset not being a short-term capital asset.

Losses in speculation business.

73. (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.

(2) Where for any assessment year any loss computed in respect of a speculation business has not been wholly set off under sub-section (1), so much of the loss as is not so set off or the whole loss where the assessee had no income from any other speculation business, shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and —

(i) it shall be set off against the profits and gains, if any, of any speculation business carried on by him assessable for that assessment year; and

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on.

(3) In respect of allowance on account of depreciation or capital expenditure on scientific research, the provisions of sub-section (2) of section 72 shall apply in relation to speculation business as they apply in relation to any other business.

(4) No loss shall be carried forward under this section for more than four assessment years immediately succeeding the assessment year for which the loss was first computed.

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", "Income from house property", "Capital gains" and "Income from other sources", or a company the principal business of which is the business of trading in shares or 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 and sale of such shares.

7. Mr. Shah, learned counsel for the appellant submits that, during the financial year 2008-2009 the appellant had ventured into transactions in securities in derivatives at recognized stock exchange and through registered brokers. The appellant had suffered losses to the tune of Rs.1,90,66,444/- in those transactions in securities in the derivatives. He submitted that, though the Commissioner of Income Tax (Appeals) was pleased to accept that the appellant had suffered loss in the transactions in securities in derivatives, he refused to consider the said loss while computing the net income of the appellant on the ground that under Section 73, the loss suffered by the assessee would be a loss from speculative business and as such, the appellant would not be entitled to claim set-off against the income from a non-speculative business.

8. It is submitted by the learned counsel that, in view of Section 28 Explanation-2 r/w Section 43(5) proviso (d) such transactions are kept out of the definition of speculative transactions.

9. The learned counsel for the appellant placed reliance on Section 73 of the Income Tax Act, 1961 and would submit that, the appellant was entitled to set-off the loss suffered by the appellant in the transactions in securities in the derivatives against the income derived by the appellant from the business of collection of toll and business of infrastructure. He submits that, the Commissioner of Income Tax (Appeals) did not deal with Section 43(5)(d) of the Income Tax Act, 1961 at all in the impugned order and erroneously held that, the entire transaction carried out by the appellant was speculative and thus loss suffered on such speculative transaction could not be claimed as set off against other heads of income. The learned counsel fairly states that, there is no dispute that, losses having arisen to the appellant on the trading in shares being speculative cannot be set-off against the other heads of income.

10. Learned counsel for the appellant placed reliance on the judgment delivered by a Division Bench of this court in case of **The Commissioner of Income Tax, Central-IV Vs. Shri. Bharat R. Ruia (HUF)** reported in **(2011) 337 ITR 452** in particular paragraph nos.6, 7, 17, 18, 21, 23, 29, 30, 33, 35 and 37 in support of the submission that, the loss suffered by the appellant in the transactions arising out of securities in derivatives were not speculative transaction under

Section 43(5) of the Income Tax Act, 1961.

11. Learned counsel for the appellant submits that, Proviso (d) to Section 43(5) of the Income Tax Act was inserted by Finance Act, 2005 with effect from 01.04.2006. He submits that, the said proviso to Section 43(5) carved out an exception to the definition of 'speculative transaction'. He submits that, the loss suffered in the transactions in derivatives before insertion of the proviso to Section 43(5) were considered as speculative and were not entitled to be set-off against the profit under any other heads of income except profit from speculative business. However, in view of the said proviso to Section 43(5) inserted by the Finance Act, 2005 with effect from 01.04.2006, the transactions in derivatives were not considered as speculative business.

12. The learned counsel for the appellant placed reliance on the judgment of the Hon'ble Supreme court in case of **Snowtex Investment Limited Vs. Principal Commissioner of Income Tax, Central-2, Kolkata** reported in **2019 SCC OnLine SC 749** and in particular paragraph nos.3 to 5, 14, 18, 25, 26, 33 and 34 in support of the submission that, the losses having arisen from trading in futures and options were not profits from a speculative business.

13. The learned counsel for the appellant distinguished the judgment of the Hon'ble Supreme Court in case of **Commissioner of Income Tax Vs. Lokmat Newspapers P. Ltd.** reported in (2010) 322 ITR 43 and would submit that, in the said judgment there were no derivative transactions involved. The transactions considered by this Court in the said judgment were arising out of trading in shares. The said judgment is thus clearly distinguishable on facts.

14. Smt. Bharaswadkar-Patil, learned counsel for the revenue on the other hand invited our attention to the grounds of Appeal before the Income Tax Appellate Tribunal and would submit that, it was clearly admitted by the appellant that no set-off of loss suffered in speculative transaction was permissible. The appellant had not claimed any set-off before the Assessing Officer. The Income Tax Appellate Tribunal, however, allowed the Rectification Application filed by the appellant.

15. The learned counsel for the revenue invited our attention to Section 43(5) (d), Section 73 and would submit that, in view of the definition of speculative transaction and in view of Section 73 of the Income Tax Act, 1961, losses in speculation business would not be governed by Section 43(5) read with proviso thereto. She submits

that, deeming fiction is created under Section 73 of the Income Tax Act, 1961. The learned counsel for the revenue placed reliance on the judgment of the Delhi High Court in case of **The Commissioner of Income Tax Vs. DLF Commercial Developers Limited** reported in (2013) 218 Taxman 45 and in particular paragraph nos.5, 6, 9 and 10. She submits that, in the said judgment it is clearly held that, objective of Section 73 apparent from the tenor of its language is to deny speculative businesses the benefit of carry forward of losses.

16. The learned counsel for the revenue made an attempt to distinguish the judgment of the Hon'ble Supreme Court in case of **Snowtex Investment Limited** (supra) on the ground that, the Hon'ble Supreme Court in the said judgment had considered the principal business of assessee. The issue before the Hon'ble Supreme Court was different. The learned counsel for the revenue strongly placed reliance on the judgment of this court in case of **Commissioner of Income Tax Vs. Lokmat Newspapers P Ltd.** (supra) and would submit that, the authorities below have rightly considered the said judgment, though the same was not directly on the issue. In support of this submissions she placed reliance on paragraph no.6 of the said judgment.

17. The learned counsel for the revenue made an attempt to

distinguish this judgment in case of **The Commissioner of Income Tax, Central-IV Vs. Shri. Bharat R. Ruia (HUF)** (supra). She submits that, question felt for consideration by this Court in this judgment was whether proviso inserted to Section 43(5) was clarificatory or not and the ratio in the said judgment would not apply to the facts of this case. The learned counsel for the revenue tenders the explanatory notes on the provisions of the Finance Act, 2005 dated 27th February, 2006 for showing the purpose and object of insertion of proviso to Section 43(5) of the Income Tax Act, 1961.

18. Mr. Shah, learned counsel for the appellant in his rejoinder argument would submit that, Section 43 of the Income Tax Act, 1961 falls under the Part (iv) of the Income Tax Act whereas, Section 43 of the said Act falls under Part (vi). It is submitted that, the appellant in this case had three sources of income i.e. (i) income arisen out of infrastructure business, (ii) losses incurred in the transaction in derivatives and (iii) losses suffered in transaction in equity shares. The appellant had claimed set-off in respect of the loss derived in the derivative transaction against the profits having arisen from the infrastructure business. He invited our attention to Section 73 of the Income Tax Act, 1961 and would submit that, the business of the infrastructure carried out by the appellant is not a speculative

business. It is not the case of the revenue that, loss in transactions in securities carried out by the appellant in derivatives is a speculative business. He submits that, since business in derivative is not included in the definition of speculative business, the loss suffered by the appellant is permitted to be set-off against income having arisen to the appellant out of infrastructure business.

19. The learned counsel for the appellant strongly placed reliance on Section 70 of the Income Tax Act and would submit that, loss suffered by the appellant in the transactions in securities in derivatives being one of the distinct business falling under head of the income from business, the appellant is entitled to set-off the loss under the said source against the income having arisen from the infrastructure business which is also a distinct business falling under Section 28 of the Income Tax Act, 1961. He submits that, loss suffered by the assessee under distinct business under the said head can be also adjusted against the income of another business under the head of income under Section 28. Section 73 deals with the set-off of speculative business and thus reliance placed by the learned counsel for the revenue on the proviso thereto is totally misplaced. Learned counsel for the appellant invited our attention to the paragraph no.14,

17, 25 and 36 of the judgment of the Hon'ble Supreme court in case of **Snowtex Investment Limited** (supra) and would submit that, the Hon'ble Supreme Court has considered the Memorandum issued by the Government explaining the amendment to Section 43(5) of the Income Tax Act, 1961.

REASONS AND CONCLUSIONS

20. The Assessing Officer did not consider the effect of insertion of proviso to Section 43(5) of the Income Tax Act in the impugned order at all. The Commissioner of Income Tax (Appeals) allowed the Rectification Application filed by the appellant under Section 143(3) read with Section 143 (1). The said order passed by the Commissioner of Income Tax (Appeals) allowing the Rectification Application filed by the appellant was not challenged by the respondent-revenue at any stage.

21. The Commissioner of Income Tax (Appeals) observed that, the Assessing Officer had not impugned anything in regard to the share trading loss in the assessment order under Section 143(3) and had rejected the Rectification Application stating that as per the return of income there was an income of Rs.85,43,220/- and hence there was no mistake apparent from record which required rectification. In

paragraph no.9 of the said order passed by the Commissioner of Income Tax (Appeals) it was observed that, on verification of the case record, it was noticed that the appellant company had carried out activity of share trading in derivatives and had incurred loss amounting to Rs.1,90,66,444/-.

22. The Commissioner of Income Tax (Appeals), however, considered the explanation to Section 73 of the Act and erroneously observed that, income from share trading is to be regarded as speculative income. The Commissioner of Income Tax (Appeals), adverted to the judgment of the Delhi High court in **The Commissioner of Income Tax Vs. DLF Commercial Developers Limited** (supra) and held that, the loss claimed by the appellant company in respect of the share trading in derivative at Rs.1,90,66,444/- is to be assessed as speculative loss. However, the set-off being speculative loss could not be set-off against the regular business income assessed by the Assessing Officer at Rs.90,79,092/- as claimed by the appellant. The Commissioner of Income Tax (Appeals) did not consider or dealt with the contention of the appellant that, in view of amended provisions of Section 43(5)(d), the trading of shares in derivatives was to be assessed as the regular business and not speculative business and thus

loss if any in transaction in derivative was required to be set-off against the other heads of income.

23. In the impugned order, the Income Tax Appellate Tribunal has dealt with the grounds raised by the appellant that the learned CIT(A) erred in law and on facts in confirming an addition on transactions in derivatives on recognized stock exchange as defined in Section 43(5)(d) of the Income Tax Act, 1961 with reference to explanation given to Section 73 of the Income Tax Act, 1961 which is applicable to speculative transactions. The Income Tax Appellate Tribunal, however, considered the judgment of this Court in case of **Commissioner of Income Tax Vs. Lokmat Newspapers P. Ltd.** (supra) and more particularly paragraph nos. 6 to 10 and erroneously held that, in view of the admitted facts of the case, the ground no.3 raised in Appeal filed by the appellant-assessee is dismissed. The Income Tax Appellate Tribunal did not consider the effect of insertion of the proviso in Section 43(5) of the Income Tax Act, 1961 by the Finance Act, 2005 with effect from 01.04.2006 at all.

24. Chapter IV of the Income Tax Act, 1961 provides for computation of total income under five heads. Section 28 to 44DB deals with profits and gains of any business or profession and about

various permissible deductions out of such income. Section 43 provides for definitions of certain terms relevant to income from profits and gains of business or profession and more particularly under Section 28 to 41 of the Income Tax Act, 1961. Section 43(5) of the Income Tax Act defines that '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.

25. In this case, the appellant has not claimed any set-off of the loss suffered by the appellant in the transactions in shares where delivery was actually effected. The appellant has admittedly claimed set-off of the loss suffered in respect of transactions in derivatives in view of the Finance Act, 2005 with effect from 01.04.2006. It is thus clear beyond reasonable doubt that the transaction in derivative was carved out as an exception in the definition of speculative transaction. None of the Authorities below, however, considered and dealt with the effect of said proviso (d) to Section 43(5) of the Income Tax Act, 1961 inserted by the Finance Act, 2005 with effect from 01.04.2006 in the impugned orders.

26. The explanatory notes on the provisions of the Finance Act, 2005 clearly indicates that the existing provision before such amendment of Clause (5) to Section 43 defines "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. Proviso to Section 43(5) list out certain transaction which are not deemed to be speculative transaction.

27. By the said explanatory note it was made clear that, the Finance Act, 2005 has amended Section 43(5) to provide that an eligible transaction in respect of trading in derivatives of securities carried out on a recognized stock exchange shall not be deemed as speculative transaction. The notification prescribing the transaction which are not deemed to be speculative transaction. It was made clear that the Finance Act, 2005 has, accordingly, amended Section 43 (5) to provide that an eligible transaction in respect of trading in derivatives of securities carried out on a recognized stock exchange shall not be deemed as speculative transaction. The notification prescribed the rules and the conditions to be fulfilled by a stock exchange to be recognized by the Central Government for the purposes of Section 43(5) [i.e., Rules 6DDA and 6DDB of the Income Tax Rules, 1962]

published in the Official Gazette on 1st July, 2005 vide S.O. No.932(E).

28. The Hon'ble Supreme Court in case of **Snowtex Investment Limited** (supra) had considered an appeal arising out of the judgment of the High Court holding that the profits which had arisen from trading in futures and options were not profits from a speculative business and hence loss arising out of trading in shares could not be set off against the profits arising from the business of futures and options. In paragraph No. 15 of the said judgment, the Hon'ble Supreme Court held that the impact of the amendment to Section 43 (5) of the Income Tax Act by Finance Act, 2005 was that an eligible transaction on a recognized stock exchange in respect of trading in derivatives was deemed not to be a speculative transaction.

29. With effect from 01.04.2006, trading in derivatives was by a deeming fiction not regarded as a speculative transaction when it was carried out on a given stock exchange. Prior to the amendment, Section 43 (5) defined a "speculative transaction" to mean a transaction in which a contract for the purchase or the sale of any commodity including stocks and shares which settled otherwise other than by the actual delivery or transfer of the commodity or scrips. The Hon'ble Supreme Court also considered the circular issued by the

Central Board Direct Taxes dated 27.02.2006 and observed that the amendment by the Finance Act, 2005 was occasioned by the changes which were introduced by SEBI both at the legal and technological level for bringing in greater transparency in the market for derivatives.

30. The Hon'ble Supreme Court also considered the memorandum explaining the amendment introduced in the provisions of sub-section 43 (5) by the Finance Act, 2005 with effect from 01.04.2006. It is held that while amending the provisions of Section 43 (5), the Parliament indeed was cognizant of the provisions which were contained in Section 73 (4) of the Income Tax Act, 1961. It is held that it was only with effect from 01.04.2015 that an amendment was brought about to exclude trading in shares from the deeming provision contained in the Explanation to Section 73.

31. The Hon'ble Supreme Court held that it would be difficult to hold that the provisions which were contained in the Finance Act (No. 2) of 2014 in so far as they amended the Explanation to Section 73 were clarificatory or that notwithstanding the provision by which the amendment was brought into force with effect from 01.04.2015, that it should be given retrospective effect. The Hon'ble Supreme Court held that the amendment which was brought by Parliament to

the Explanation to Section 73 by the Finance (No. 2) Act, 2014 was with effect from 01.04.2015. In its legislative wisdom, the Parliament amended Section 43 (5) with effect from 01.04.2006 in relation to the business of trading in derivatives, the Parliament brought about a specific amendment in the Explanation to Section 73, in so far as trading in shares is concerned, with effect from 01.04.2015. The latter amendment was intended to take effect from the date stipulated by Parliament.

32. The Hon'ble Supreme Court accordingly showed no reason to hold either that it was clarificatory or that the intent of Parliament was to give it retrospective effect. The Hon'ble Supreme Court accordingly held that in the assessment year 2008-2009, the loss which occurred to the assessee as a result of its activity of trading in shares (a loss arisen from the business of speculation) was not capable of being set off against the profits which it had earned against the business of futures and options since the latter did not constitute profits and gains of a speculative business. The Hon'ble Supreme Court accordingly did not interfere with the view taken by the High Court. The principles of law laid down by the Hon'ble Supreme Court in the said judgment in case of **Snowtex Investment Limited** (supra) apply to the facts of this case.

33. Section 73 (1) of the Income Tax Act provides that 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 by Taxation Laws (Amendment) Act, 1975 with effect from 01.04.1977. The Explanation was inserted below Section 73 (4) of the Income Tax Act.

34. A perusal of the Explanation indicates that where any part of the business of a company other than the exceptions carved out therein consist in the purchase and sale of shares of other companies, such companies shall, for the purpose of section 73, be deemed to be carrying on a speculation business to the extent to which the business consist of the purchase and sale of shares. Proviso (d) to Section 43 (5) which defined “speculation transaction” was admittedly inserted by Finance Act, 2005 with effect from 01.04.2006. The said provision has been interpreted by the Hon’ble Supreme Court in case of **Snowtex Investment Limited** (supra).

35. It is thus clear that, the transactions in respect of trading in derivatives referred to in Clause (ac) of Section 2 of Securities Contracts (Regulation) Act, 1956 carried in a recognized stock exchange are excluded from the definition of “speculation transaction”

described under Section 43 (5) of the Income Tax Act, 1961. In our view, the respondents thus, cannot be allowed to contend that the appellant had claimed any set off of the losses suffered by the appellant in respect of the speculation business carried on by the assessee against the profits and gains, if any, of another speculation business.

36. In our view, Section 73 (1) as well as the explanation inserted by Taxation Laws (Amendment) Act, 1975 with effect from 01.04.1977 thus would not apply to the loss having arisen in the trading in derivatives being not speculative transaction which is excluded from the definition of “speculation transaction” described under Section 43 (5) of the Income Tax Act. In the facts of this case, the appellant has claimed set off in respect of the loss suffered by the appellant in the transaction in derivatives against the income arising of infrastructure business under the head of income from business or profession under Section 28 of the Income Tax Act, 1961.

37. The Division Bench of this Court in case of **Commissioner of Income Tax Vs. Shri Bharat R. Ruia (HUF)** has considered the substantial question of law i.e. “whether the transactions in exchange traded financial derivatives are speculative transactions” as defined in

Section 43 (5) of the Income Tax Act, 1961. In the facts of that case, proceedings arising out of the assessment year 2003-2004 were in question. In paragraph No. 23 of the said judgment, this Court held that plain reading of clause (d) of Section 43 (5) makes it clear that with effect from 01.04.2006 only those eligible transaction in derivatives referred to under Section 2 (ac) of 1956 Act which were carried out in a recognized stock exchange shall not be deemed to be a speculative transaction. It is only because, the transactions in derivatives referred to under Section 2 (ac) of the Act carried out in a recognized stock exchange were covered under Section 43 (5) of the Act, the legislature could exclude those transactions from the purview of Section 43 (5) with effect from 01.04.2006.

38. This Court in the said judgment also considered the “Handbook on Derivatives Trading” published by the National Stock Exchange of India. This Court clearly held that the legislature by Finance Act, 1995 has specifically provided that clause (d) to the proviso to Section 43 (5) shall come into operation prospectively with effect from 01.04.2006. After insertion of clause (d), all transactions in derivatives are not taken outside the purview of Section 43 (5). It is only those derivative transactions which are covered under clause (d) are taken outside the purview of Section 43 (5) and the rest of the

transactions in derivatives would continue to be covered under Section 43 (5) of the Income Tax Act. This Court rejected the submission made by the revenue that clause (d) was inserted to proviso to Section 43 (5) had retrospective effect. This Court accordingly held that the exchange traded derivative transaction carried on by the assessee during the assessment year 2003-2004 (i.e. prior to insertion of Clause (d) to the proviso to Section 43 (5) of the Finance Act, 2005) were speculative transactions covered under Section 43 (5) of the Act and the loss incurred in those transactions were liable to be treated as speculative loss and not business loss.

39. In the facts of this case, admittedly the assessment year in question is 2009-2010 and financial year is 2008-2009 i.e. after insertion of the said Clause (d) to the proviso to Section 43 (5) of the Income Tax Act, 1961. The principles laid down by this Court in the said judgment in case of **Commissioner of Income Tax Vs. Shri Bharat R. Ruia (HUF)** interpreting clause (d) inserted in the proviso to Section 43 (5) by Finance Act, 2005 with effect from 01.04.2006 apply to the facts of this case. Transactions in derivatives carried out by the assessee after 01.04.2006 thus would not be speculative transactions.

40. In so far as the judgment of this Court in case of

Commissioner of Income Tax Vs. Lokmat Newspapers Pvt. Ltd. (supra)

relied upon by the learned counsel for revenue is concerned, the substantial question of law fell for consideration of this Court in the said judgment was “whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in allowing brought forward speculation loss to be set off against delivery based profits earned by the assessee-company from sale and purchase of shares”.

41. The assessee in that matter had offered the profit as a profit of speculation business and had claimed set off against a speculation loss brought forward from the assessment years 1996-1997 to 1998-1999. This court in the said judgment had not considered the clause (d) inserted to proviso to Section 43 (5) of the Income Tax Act and had considered unamended Section 43 (5) and Section 73. The said judgment in our view is clearly distinguishable on the facts and thus would not advance the case of the revenue. The reliance placed by the Income Tax Appellate Tribunal on the said judgment in case of **Commissioner of Income Tax Vs. Lokmat Newspapers Pvt. Ltd.** (supra) is totally misplaced.

42. In so far as judgment of Delhi High Court in case of the **Commissioner of Income Tax Vs. DLF Commercial Developers Limited**

(supra) relied upon by the learned counsel for revenue is concerned, the Delhi High Court has taken a view contrary to the view taken by this Court in case of **Commissioner of Income Tax Vs. Shri Bharat R. Ruia (HUF)** (supra). The Judgment of the Hon'ble Supreme Court in case of **Snowtex Investment Limited** (supra) was not brought to the notice of Delhi High Court while dealing with the case of **Commissioner of Income Tax Vs. DLF Commercial Developers Limited**. The said judgment of Delhi High Court would not advance the case of the revenue.

43. In our view, the Income Tax Appellate Tribunal could not have confirmed any addition on transaction in derivatives on recognised stock exchange as defined in Section 43 (5) (d) of the Income Tax Act, 1961 with reference to explanation given to Section 73 of the Income Tax Act, 1961 which is applicable to speculative transaction. By virtue of insertion of clause (d) to the proviso to Section 43 (5) of the Income Tax Act, 1961, the transactions in respect of the trading in derivatives as prescribed in clause (d) inserted in proviso to Section 43(5) would not be a speculative transaction.

44. The appellant was thus entitled to claim set off of the loss suffered by the appellant in the said transactions in derivatives against

the business income of the appellant from infrastructure business under Section 70 of the Income Tax Act 1961.

45. We accordingly pass the following order :-

(i) Substantial question of law No. 1 fell for consideration is answered in negative and in favour of the assessee.

(ii) Substantial question No. 2 is answered in affirmative and in favour of the assessee.

46. Income Tax Appeal No. 79 of 2018 is allowed in aforesaid terms. No order as to costs.

(S. G. MEHARE, J.)

(R. D. DHANUKA, J.)

PS.B.