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

WRIT PETITION NO.1777 OF 2015

Anup Lakhmichand Anand,

Mumbai .... Petitioner.

Vs.

Commissioner of Income Tax-18

& Ors. .... Respondents.

Mr. Sameer Dalal for petitioner.
Mr. Akhileshwar Sharma for Respondents-Revenue.

CORAM : K.R. SHRIRAM &
N.R.BORKAR, JJ.

DATE : 29th APRIL, 2022.

P.C.:

1. Petitioner is impugning order dated 29.9.2014 passed by respondent u/s 264 of the Income Tax Act, 1961.

2. During the year under consideration, i.e. assessment year 2008-09 petitioner had shown income from business capital gain and other sources. Petitioner filed his return of income on 30.9.2008 declaring income of Rs. 35,14,220/-. Thereafter, on 22.9.2009, petitioner filed revised return of income declaring nil income after adjusting/setting off loss arising from

derivative transactions against capital gain and other sources. As the income earned and approved on derivative transactions, according to petitioner, are to be treated as business income/loss in terms of Section 43(5) (d) of the Act as against speculative income/loss. It is petitioner's case that the loss incurred on derivative transactions is eligible for set of against income offered by the assessee under other heads of income during the year.

3. Petitioner's case was selected for scrutiny assessment and during assessment proceeding, second respondent called upon petitioner to file security transaction tax (STT) Certificate for the transactions entered into by petitioner during the year. Petitioner submitted the same on or about 13.12.2010. Second respondent once again called upon petitioner to provide details of speculative income/loss. By letter dated 29.12.2010, issued through petitioner's representative, petitioner submitted that loss on derivative transactions was speculative loss and offered the same as speculative loss and modified computation of income accordingly. According to petitioner, it is an inadvertent error. Petitioner further stated that he was unable to verify the claim with Form No.10-DB issued by the Stock Exchange wherein, loss of Rs.78,19,292 was specifically shown under loss account of derivative transactions which in terms of provision of

Section 43(5)(d) was not a speculative loss. Thereafter, assessment order dated 30.12.2010 was passed assessing petitioner's income at Rs.40,88,390/-.

4. In the assessment year 2009-10 petitioner declared loss of Rs.1,10,75,868/-. Petitioner's case was selected for scrutiny assessment. During assessment year 2009-10, petitioner had filed loss of Rs.1,30,35,823/- on account of derivative transactions and this loss was offered as normal business loss. While compiling the details of derivative loss for assessment year 2009-10 petitioner realized that similar loss on account of derivative transactions amounting to 78,19,292/- incurred in assessment year 2008-09 was inadvertently accepted by petitioner as speculation instead of normal business loss. Petitioner, thereafter, filed revision petition u/s 264 of the Act before first respondent on 15.2.2012 for assessment year 2008-09. This petition was dismissed on the grounds of delay. Petitioner filed writ petition in this Court and this court was pleased to set aside the order and send it for *denovo* consideration. In compliance with order of this Court, respondent no.1 issued notice for hearing of revision petition. Petitioner was represented and submissions were made. Petitioner also filed copies of Form No. 10-DB issued by Stock Exchange. Petitioner states that the said Form no.10-DB indicates that the

fact that loss of 78,19,292/- was loss on account of future and option (F & O) activity carried out by petitioner. Respondent no.1 by order dated 29.9.2014 dismissed revision petition by stating that additions which are voluntarily agreed can not be the subject matter of revision.

5. It is this order that is impugned in this petition.

6. We have considered the petition with documents annexed thereto, affidavit-in-reply. Also heard Mr. Dalal and Mr. Sharma.

7. As noted earlier, it is petitioner's case that when he realized his mistake treating F & O loss as speculative loss he filed the revision petition before respondent no.1 requesting him to assess his income as per law. Respondent No.1, in our view, has not considered Form 10-DB filed by the petitioner. Respondent no.1 has also not decided whether proviso (d) to section 43 (5) of the Act would cover transaction in respect of treating any derivatives carried out in a recognized Stock Exchange and if so, why it can not be treated as speculative transaction and whether loss and gain in such transaction to be dealt as normal business loss or gain. We should keep in mind that assessee should pay only such amount of tax as legally payable under the provisions of Income Tax Act. Mistakes happen and we also see

that assessee has taken different stand earlier. But the fact that is required to be seen is whether transaction in respect of trading in any derivatives carried out in the recognized Stock Exchange can be treated as speculative transaction and loss or gain in such transaction is normal business loss or gain. Courts have held that even if, return as submitted by the assessee is accepted by the Assessing Officer, and if thereafter, the assessee comes to know about the mistakes committed, that he was not liable for more taxation or had paid more tax, he can definitely approach revenue authority and in such event, it is open to the revisional authority to exercise its jurisdiction u/s 264 of the Act. Once assessee is able to satisfy about mistake due to which there was over assessment, the Commissioner had power to correct the same u/s 264(1) of the Act. In such situation, we would expect the Commissioner to apply his mind to the question and decide the matter. Simply saying, additions which are voluntarily agreed, can not be the subject matter of revision, would be little harsh on assessee. Therefore, we hereby set aside order dated 29.09.2014 impugned in this petition and remand the matter to the Commissioner of Income Tax for *denovo* consideration of petitioner's application u/s 264 of the Act. We would expect the Commissioner to consider all the documents being submitted by petitioner and the submissions of petitioner and decide for himself whether loss as claimed would be speculative loss or non speculative loss, not withstanding the stand taken by petitioner in the original return of income or in the revised return filed. It will have to be an independent view of the Commissioner.

Revision should be disposed by the Commissioner of Income Tax by 15.07.2022.

8. Before passing any order, the Commissioner shall give personal hearing, notice whereof shall be issued at least seven working days in advance. If the Commissioner is going to rely on any order or judgment of any court or Tribunal, a list thereof shall also be provided to petitioner along with the notice of personal hearing, so that petitioner will be able to deal with it or distinguish the same during the personal hearing.

9. Petition disposed accordingly.

(N.R. BORKAR, J.) **(K.R.SHRIRAM, J.)**