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

INCOME TAX APPEAL NO. 1470 OF 2017

Principal Commissioner of Income Tax – 3
Mumbai ...Appellant

Versus

DSP Merill Lynch Capital Ltd. ...Respondent

Mr. Sham Walve, for the Appellant.
None for the Respondent.

CORAM: K. R. SHRIRAM & N. J. JAMADAR, JJ
DATED: 4th MARCH, 2022

ORDER:

1. Seven questions of law proposed are as under:

(A) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in holding mark-to-market loss on open equity stock future contracts as ascertained loss without appreciating that it is not the value that is pertinent and under question but the expiry date of the contract which results in crystalization and determination of loss.

(B) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in upholding valuation mark-to-market loss on

31.03.2008 in respect of future contract held as closing stock-in-trade without appreciating that the contracts by themself have not value per-se but only on account of differential the income or loss gets generated on the expiry date or settlement and 31.03.2008 being neither of these there is no value as on said date.

(C) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in holding mark-to-market loss on interest rate swaps as ascertained loss without appreciating that it is not the value that is pertinent and under question but the expiry date of the contract which results in crystalization and determination of loss.

(D) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in holding that Investment in Shares held as stock-in-trade has to be exclusded from 'Investments' as required to be taken under Rule 8D, without appreciating, that stock-in-trade of shares is nothing but Business Investments.

(E) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in holding mark-to-market losses on future contracts as not to be added back to Book-Profits u/s 115JB as the same are ascertained losses, without appreciating, that it is not the value that is pertinent and under question but the expiry date of the contract which results in crystalization and determination of loss.

(F) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in holding that no interest is disallowable under Rule 8D2(ii) as assessee has more interest free funds than the investments, without appreciating, that once Rule 8D gets applicable there remains no leeway to consider disallowance of said interest under one reason or other but simply to follow the working as prescribed in the Rule.

(G) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in holding that no interest is disallowable under Rule 8D2(ii) as interest income is more than interest expenditure, without appreciating, that Rule 8D working only interest expenditure is required to be considered, consideration of interest income or net interest has not been provided for.

2. The first three questions (A to C) of law related to the valuation of mark-to-market loss as on 31st March, 2008. A Division Bench of this Court in ***Commissioner of Income Tax – 16, Mumbai vs. D. Chetan & Co.***[1] has held that so long as it is not a case of speculative transaction and the loss incurred was of forward contract in the regular course of business, the loss incurred as forward contract should be allowed as business loss.

3. So far as the substantial question (D) proposed, the Tribunal has followed a judgment of this Court in ***Commissioner of Income Tax - 9 vs. India Advantage Securities Ltd.***[2] to hold that the provisions of Section 14A read with Rule 8D will not be applicable to investment of shares and securities held as stock in trade. Nothing is placed to indicate, as to why this judgment of the Bombay High Court was not applicable to the facts in hand.

4. Then as regards question (E), it emanates from questions (A), (B) and (C) proposed and since we are not impressed that

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2[2017] 79 taxmann.com 370 (Bombay).

there is any substantial question of law involved for the proposed questions (A), (B) and (C), this also cannot be considered as a substantial question of law to be considered by this Court.

5. As regards proposed questions (F) and (G), on facts, the ITAT has accepted that the assessee has demonstrated that the interest income earned during the relevant previous years far exceeds the interest expenditure. The ITAT has also relied upon a judgment of this Court in ***Commissioner of Income Tax – 2, MumbaI vs. HDFC Bank Ltd.***[3] where the Court held that where assessee's own funds and other interest bearing funds were more than investment in tax free securities, order passed by Assessing Officer disallowing a part of interest demand under Section 14A has to be set aside. There is nothing to indicate why this judgment is not applicable to the facts and circumstances of the case.

6. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that questions as pressed raise any substantial question of law.

3[2014] 49 taxmann.com 335 (Bombay).

7. The appeal is devoid of merits and it is dismissed with no order as to costs.

[N. J. JAMADAR, J.] [K. R. SHRIRAM, J.]