

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'ई', मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "E", BENCH MUMBAI

सर्वश्री आर.सी.शर्मा, लेखा सदस्य एवं श्री संजय गर्ग, न्यायिक सदस्य

BEFORE SHRI R.C.SHARMA, AM

&

SHRI SANJAY GARG, JM

आयकर अपील सं./ITA No.7737/Mum/2010

(निर्धारण वर्ष / Assessment Year :2007-08)

Edelweiss Securities Ltd., 14 th Floor, Express Towers, Nariman Point, Mumbai-400021	Vs.	ADCIT Rg.4(1), Mumbai-20
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACK 3792 N		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

AND

आयकर अपील सं./ITA Nos.7952/Mum/2010

(निर्धारण वर्ष / Assessment Year :2007-08)

ADCIT Rg.4(1), Mumbai-20	Vs.	Edelweiss Securities Ltd., 14 th Floor, Express Towers, Nariman Point, Mumbai-400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACK 3792 N		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Ravikant S. Pathak

राजस्व की ओर से /Revenue by : Ms. Manjunatha Swamy

सुनवाई की तारीख / Date of Hearing : 10/07/2015

घोषणा की तारीख/Date of Pronouncement 11/09/2015

आदेश / O R D E R

PER R.C.SHARMA (A.M):

These are the cross appeals filed by the assessee and revenue against the order of CIT(A), Mumbai, for the assessment year 2007-08, in the matter of order passed u/s.143(3) of the I.T.Act.

2. Rival contentions have been heard and record perused. Facts in brief are that the assessee is a share broker and also investor and dealer in securities, stocks, shares, derivatives and other permissible marketable instruments. During the course of scrutiny assessment the AO made addition on account of VSAT/lease line charges on the plea of non-deduction of tax u/s.40(a)(ia) of the Act. The AO also made disallowance u/s.14A and penalty paid to stock exchange, mark to market loss on account of trading in derivative transactions was also declined by the AO.

3. By the impugned order the CIT(A) deleted the addition with respect to VSAT charges, part of addition made u/s.14A, penalty paid to SEBI. However, the CIT(A) confirmed the addition on account of mark to market loss and part of the addition made u/s.14A. Against this order of CIT(A) both the assessee and revenue are in appeals before us.

4. At the outset Id. AR contended that the issue with regard to disallowance of VSAT charges for non-deduction of tax has been consistently decided by various benches of the Tribunal including assessee's own case for the A.Y.2006-07 & 2008-09, as well as the Hon'ble Bombay High Court in Angel Capital & Debt market Ltd., in assessee's favour.

5. We have considered rival contentions and found that the issue with regard to payment of VSAT/lease line charges to the stock exchange without deduction of tax at source is covered in favour of assessee by the decision of Hon'ble Bombay High Court in the case of Angel Capital & Debit Market Ltd., I.T Appeal(L) No.475 of 2011, dated 28-7-2011. Similar

issue has been considered by various benches of the Tribunal as well as assessee's own case for the assessment year 2005-06 and 2006-07 vide order dated 28-3-2012 and the issue has been decided in assessee's favour. The precise observation of the Hon'ble Bombay High Court is as under :-

"2. As regard first two questions are concerned, the findings of fact recorded by the ITAT is that VSAT and Lease Line charges paid by the assessee to Stock Exchange were merely reimbursement of the charges paid/payable by the Stock Exchange to the Department of Telecommunication. Since the VSAT and Lease Line charges paid by the assessee do not have any element of income, deducting tax while making such payments do not arise. Hence, question Nos.(A) and (B) cannot be entertained."

Respectfully following the decision of Hon'ble Bombay High Court as well as the decision of the Tribunal in assessee's own case, we do not find any infirmity in the order of the CIT(A) in regard to addition made on account of VSAT/lease line charges without deduction of tax at source.

6. The revenue is also aggrieved for deleting the penalty of Rs.55,000/- paid to SEBI.

7. Ld. DR fairly conceded that this issue is also covered by the decision of Hon'ble Bombay High Court in the case of Angel Capital & Debit Market Ltd (supra). The precise observation of the Hon'ble Bombay High Court is as under :-

"3. As regards question (C) is concerned the finding of fact recorded by the ITAT is that the amount paid as penalty was on account of irregularities committed by the assessee's clients. Such payments were not on account of any infraction of law and hence allowable as business expenditure. In such as case the explanation to Section 37 would not apply. Accordingly question (C) raised by the Revenue cannot be entertained."

Respectfully following the decision of Hon'ble Bombay High Court, we do not find any infirmity in the order of the CIT(A) in regard to deleting the penalty of Rs.55,000/-

8. The assessee is aggrieved for not deleting the disallowance of mark to market loss on account of derivative transactions by considering the same to be contingent loss. We found that the issue has been decided by the Tribunal in assessee's own case in its favour. There are various decision of other coordinate benches wherein exactly similar issue was decided in favour of the assessee. The precise observation of the Tribunal in assessee's own case was as under :-

"12. We have carefully gone through the facts of the case as observed by the AO in the assessment order and also recorded by the CIT(A) in his order and the references made by the AR to the various aspects of the case from the paper book. According to the AR, case of the assessee on the issue of provision for loss on mark to market, is covered by the decision arrived at by the coordinate Bench of I.T.A.T., Mumbai in the assessee's sister concern, i.e. Edelweiss Capital Ltd. Mumbai in ITA No. 5324/M/2007 dated 10.10.2010, wherein the Hon'ble coordinate Bench held as under:-

"The aforesaid Note gives a fair picture of the nature of provision. The provision in substance has been made to cover the anticipated loss in the derivatives trading. There is no dispute that the assessee holds derivatives as its stock-in-trade and there is also no dispute that it follows the principle "cost or market price, whichever is lower" in valuing the derivatives. When the derivatives are held as stock-in-trade then whatever rules apply to the valuation of stock- in-trade will have to be necessarily apply to their valuation also. It is a well settled position in law that "while anticipated loss is taken into account in valuing the closing stock, anticipated profit in the shape of appreciated value of the closing stock is not brought into the account, as no prudent trader would care to show increased profit before its realization. This is the theory underlying the rule that the closing stock is to be valued at cost or market price whichever is the lower, and it is now generally accepted as an established rule of commercial practice and accountancy". This is what the Supreme Court held in the case of Chainrup Sampatram vs. Commissioner of Income Tax, West Bengal (1953) 24 ITR 481 (SC), speaking through Hon'ble Justice Patanjali Sastri, the then Chief Justice of India (page

485 - 486 of the Report). At page 486 the Supreme Court further observed that "loss due to a fall in price below cost is allowed even if such loss has not been actually realized". Quoting from the case of *Whimster & Co. vs. Commissioners of Inland Revenue* (1926) 12 Tax Cases 813, the Supreme Court observed that the profits that are chargeable to tax are those realized in the year and that an exception is recognized where a trader purchased and still holds goods which are fallen in value in which case though no loss has been realized nor it has occurred, nevertheless at the close of the year he is permitted to treat these goods as of their market value. The decision of the Supreme Court governs the facts of the present case. It is to the assessee's strength that the Institute of Chartered Accountants of India in its guidelines have also approved of the rule of prudence which really means that while anticipated losses can be taken note of while valuing the closing stock, anticipated profits cannot be recognized. The anticipated loss, in the light of the judgment of the Supreme Court cited above, cannot be treated as a contingent liability.

8. The learned DR pointed out that the assessee has valued each scrip of the derivatives as at the end of the year. We do not see how this can make any difference to the legal principle. If the derivatives have been treated as stock-in-trade then there is nothing unusual in the assessee valuing each derivative by applying the rule cost or market whichever is lower.

9. We, therefore, direct the Assessing Officer to allow the provision as reflecting in substance the loss arising on account of valuation of the closing stock. The ground is allowed."

13. Besides the case of the assessee's sister concern, the AR also cited the cases of *Bank of Bahrain & Kuwait*, reported in 41 SOT 290 (Mum-SB) and the case of *Hon'ble Supreme Court in Woodward Governor India Pvt. Ltd.*, reported in 312 ITR 254. It was pointed out by the AR that the case so heavily relied upon by the AO and the CIT(A), i.e. the case of *CIT Vs. Kamani Metal and Alloys Ltd.* 208 ITR 1017 (Bombay) had been distinguished on facts. The DR, after the Bench, submitted an untitled extract wherein it mentioned that where such money is stock in trade, the loss had to be accounted for as per accounting standards.

14. We find that the case so heavily relied upon by the Revenue authorities have facts which are no different footings. In that case, where the contract was between the assessee and MMTC, no raw material was purchased during the relevant accounting year. The raw material was received in the next accounting year. The Hon'ble High Court, on these facts held that since there was no material except the paper contract, the material so contracted could not be regarded as assessee's stock in trade.

15. In the case at hand, the assessee had been engaging in marked to market on daily basis and on the last day of the financial year, provision is made in the Profit & Loss Account against anticipated loss.

16. We have also followed the guidance note on accounting for Equity Index and Equity Stock Futures and options (as placed in the

APB), as to how the ICAI has dealt with the issue. We have also seen that the ICAI has prescribed the accounting treatment to be followed by the persons engaged in mark to market on equity index / stock futures. It is also imperative for the companies to strictly follow the standard and guideline fixed by ICAI.

17. Taking into account the details and the explanations submitted by the AR and taking into account the guidance note issued by ICAI, which the companies have to follow, besides the several case laws cited by the Revenue authorities and by the AR, we are of the opinion that the assessee has rightly claimed the provision in the Profit & Loss Account.

18. We are of the considered view that the assessee has a strong case to make provision for loss on mark-to-market basis. We therefore delete the disallowance made by the revenue authorities. In the result, the appeal filed by the assessee is partly allowed."

As the facts and circumstances during the year under consideration are same, respectfully following the decision of the Tribunal in assessee's own case, we do not find any merit for the disallowance made by the AO on account of provisions for loss on mark to market.

9. With regard to disallowance made u/s.14A, we found that the assessment year under consideration is A.Y.2007-08, in which rule 8D is not applicable keeping view the decision of the Tribunal in assessee own case vis-à-vis the decisions of other benches of the Tribunal, we restrict the disallowance to the extent of 10% of the dividend income.

10. The revenue is also aggrieved for deleting disallowance of transactions charges paid without deduction of tax at source. Ld. AR place don record latest decision of ITAT Mumbai Bench in case of Mehta Vakil & Co. Pvt.Ltd., ITA No.8741/Mum/2011, order dated 13-3-2015, wherein after considering the decision of Hon'ble Bombay High Court in the case of Kotak Securities Ltd., 340 ITR 333, the issue was decided in favour of the assessee.

11. We have considered rival contentions and gone through the order of the Tribunal in case of Mehta Vakil and Co. Ltd.. The precise observation of the Tribunal with regard to the disallowance made for transaction charges paid without deduction of tax at source was as under:-

“3. We notice that the Hon’ble jurisdictional Bombay High Court has held in the case of CIT Vs. Kotak Securities Ltd (2012)(340 ITR 333) that the transaction charges paid by the assessee to the stock exchanges constitute ‘fee for technical services’ and the same is liable for tax deduction at sources u/s 194J of the Act. However, before the Hon’ble High Court, the assessee therein pleaded that it was under bonafide belief that no tax was deductible at source. The Hon’ble High Court also noticed that the assessee has been paying the transaction charges for the past several years without subjecting the same to tax deduction at source and the department has also allowed the claim. Hence the Hon’ble High Court, under these peculiar facts, held as under:-

“However, since both the revenue and assessee were under the bona fide belief for nearly a decade that tax was not deductible at source on payment of transaction charges, no fault can be found with the assessee in not deducting the tax at source in the assessment year in question consequently disallowance made by the assessing officer under section 40(a)(ia) of the Act in respect of the transaction charges cannot be sustained. We made it clear that we have arrived at the above conclusion in the peculiar facts of the present case, where both the revenue and the assessee right from the insertion of section 194J in the year 1995 till 2005 proceeded on the footing that the assessee is not liable to deduct tax at source and in fact immediately after the assessment year in question, i.e. from A.Y. 2006-07 the assessee has been deducting tax at source while crediting the transaction charges to the account of stock exchange.”

4. The decision of the Hon’ble Bombay High Court was rendered on 21- 10-2011 and the present assessment year is AY 2008-09. We have already noticed that, prior to the decision of Honble Bombay High Court, the various benches of the Tribunal have been holding that the tax was not deductible at source from the transaction charges paid to the Stock exchanges. Hence, it can be seen that the assessee before us also, was under bona fide belief in this regard and hence, we are of the view that the benefit of doubt given to the assessee by the Hon’ble Bombay High Court in the case of Kotak Securities Ltd (supra) should also be extended to the assessee. The Ld A.R submitted that the assessee has started deducting tax at source from the transaction charges subsequent to

the decision of Hon'ble Bombay High Court. The Ld A.R also brought to our notice the decision rendered by the co-ordinate bench of Mumbai Tribunal in the case of M/s Mape Securities Pvt Ltd (ITA No.842/Mum/2012 dated 24.11.2014 relating to AY 2008-09), wherein also the co-ordinate bench has taken identical view. Hence, for the foregoing reasons, we uphold the decision of Ld CIT(A) on this issue."

As the facts and circumstances during the year under consideration are same, respectfully following the decision of coordinate bench, we confirm the action of the CIT(A) for deleting the disallowance of transaction charges paid without deduction of tax at source. We direct accordingly.

12. In the result, appeal of the assessee is allowed in part whereas appeal of the revenue is dismissed.

Order pronounced in the open court on this 11/09/2015.

Sd/-
(संजय गर्ग)
(SANJAY GARG)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(आर.सी.शर्मा)
(R.C.SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 11/09/2015

प्र.कु.मि/pkm, नि.स/ PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai