

आयकर अपीलीय अधिकरण “एच” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “H” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAVISH SOOD, JM

आयकर अपील सं./I.T.A. No.1108/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2010-11)

Asst. CIT-5(2)(2), Room No. 571, 5 th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020	बनाम/ Vs.	M/s. Kiran Gems Pvt. Ltd. FE 5011, Bharat Diamond Bourse, Bandra Kurla Complex, Bandra (E), Mumbai-400 051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AADCK 1665 M		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri B. Srinivas
प्रत्यर्थी की ओर से/Respondent by	:	Shri R. Murlidhar & Shri K. A. Vaidyalingan

सुनवाई की तारीख / Date of Hearing	:	05.04.2018
घोषणा की तारीख / Date of Pronouncement	:	09.04.2018

आदेश / ORDER

Per Shamim Yahya, A. M.:

This appeal by the Revenue is directed against the order by the Commissioner of Income Tax (Appeals) dated 20.11.2015 and pertains to the assessment year 2010-11.

2. The grounds of appeal read as under:

l(a). On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the interest of Rs. 24,84,689/- disallowed u/s 36(1)(iii) of the Income Tax Act, 1961.

l(b). On the facts and in the circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that the assessee had not established that the

advance of Rs. 6,04,76,384/- given for purchase of business premises in Bharat Diamond Bourse and other immovable properties including Amby Valley Project, Gujrat Hira Bourse & Suzlon Energy was made out of its own funds or interest free funds.

l(c). On the facts and in the circumstances of the case and in law, the Ld, CIT(A) failed to appreciate that the decision of the Hon'ble Bombay High Court in the case of Reliance Utilities & Power Ltd (313 ITR 340) was given in the context of investments made in sister concerns and the presumption of interest free funds being available with the assessee for investment in property would not apply.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing to allow deduction of the amount of Rs. 29,42,23,853/- being amount credited to exchange difference gain account on reversal of provision for loss made on 31.03.2009.

3. The appellant prays that the order of the Ld. CIT(A) be set aside and the order of the AO be restored.

3. Brief facts of the case are as under:

In this case, the Assessing Officer has noticed that the assessee company has given advance for purchase of business premise in Bharat Diamond Bourse (BDB) and other immovable properties including Amby Valley Project, Gujrat Hira Bourse and Suzlon Energy. Since these advances are for fixed assets and they have not been put to use during the year, the Assessing Officer has worked out average investment on all these projects over a period of time to Rs.6,04,76,384/- and disallowed the interest of Rs.24,84,689/- attributable to these advances as under:

$$\frac{\text{Interest x Advance for fixed assets}}{\text{Total assets}} = \frac{39,33,27,832 \times 6,04,76,384}{957,34,50,680} = 24,84,689$$

4. Before the Id. Commissioner of Income Tax (Appeals), the submissions of the assessee were noted as under:

The Ld.AR has argued that advances for acquiring business premises in BOB and others were met from the own funds. There were no specific borrowing made for making these payments is Since the borrowed funds have gone for specific

purposes like packing credit and post shipment credit. He further argued that the provisions of sec. 36(1)(iii) will not attract in his case since no fund was were no specific borrowings made for making these advance payments since the borrowed funds have gone for specific purposes like packing credit and post shipment credit. The learned AR has submitted before the AO that the company is having share capital and reserves of Rs.279.54 cr besides unsecured interest-free loans of Rs.118.10 cr. on the last day of the year. The learned AR has also brought to my notice the provisions of section 36(1)(iii) which provides for not allowing actual interest paid on capital borrowed which has been used for acquisition of capital assets which are not put to use. Since no amount was borrowed for the purpose of acquisition of the assets under dispute, the learned AR has pleaded that the provisions of section 36(1)(iii) are not applicable in its case. The learned AR has also relied on several decisions including the decisions of the jurisdictional ITAT as per his written submissions.

5. Considering the above, the Id. Commissioner of Income Tax (Appeals) accepted the assessee's submissions that the investment was made on account of mixed funds from which it was emanating that the assessee has sufficient own funds. The Id. Commissioner of Income Tax (Appeals) also placed reliance upon the decision of the Hon'ble Bombay High Court in the case of *ITO vs. Reliance Utilities & Powers Ltd.* (313 ITR 340). In this regard, we may gainfully refer to the Id. Commissioner of Income Tax (Appeals)'s order as under:

4.2 I have carefully considered the facts and submissions of the learned AR. The AO has disallowed proportionate interest on the advances given for acquisition of certain business assets since they were not put to use during the year. The AO has also argued that since the funds are mixed up, it is difficult to bifurcated the funds which have gone into investment from own funds and borrowed funds. The argument c; the learned AR, on the other hand, is that the borrowed funds were for a specific purpose i.e for packing and post shipment purposes since the appellant company is fully into export business and submitted the loan sanction letters from the banks in support of his claim. After careful examination of the facts of the case I have noticed that a similar issue has come before the Honourable ITAT, Mumbai in the case of *Karp Impex Ltd* wherein the ITAT has given relief to the appellant. The relevant paras of the order of the ITAT in ITA No.4500/Mum/2010 dt. 21.1.2015 in that case, are reproduced as under-

7. Relying on the decision of the Bombay High Court for the case of *IT vs. Reliance Utilities & Powers Ltd.*(313ITR340), wherein it was held that if

there were funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest free funds generated or available with the company, if the interest free funds were sufficient to meet the investments.

8. In the present case the investment in office premises is only 1.18% of the own funds of the assessee company in the year under consideration and therefore the presumption would arise that the assessee company has invested its own funds in purchasing the office premises and not used the borrowed funds and therefore, no portion of interest paid on borrowings can be disallowed invoking section 36(1)(iii) of the Act.

In the instant case the advances to the properties work out to only 1.51% of own funds. Since the facts and circumstances being same in the present case, respectfully following the above decision of the jurisdictional ITAT the ground is allowed.

6. Against the above order, the Revenue is in appeal before us.

7. We have heard both the Id. Counsel of the assessee and perused the records. We find that it is undisputed that the investment has been done out of mixed source of funds. The assessee had sufficient own funds which covers more than the investment made. Moreover, the Id. Commissioner of Income Tax (Appeals) has also given a finding that the loan funds were for specific purpose and there has been no dilution of the same. Under these circumstances, reliance upon the case laws mentioned by the Id. Commissioner of Income Tax (Appeals) is germane and supports the case of the assessee. Accordingly, we do not find any infirmity in the same. Hence, we uphold the order of the Id. Commissioner of Income Tax (Appeals).

Ground no.2

8. The brief facts of the case on this issue are that the assessee has claimed that a sum of Rs.29,42,23,853/- should be allowed to be reduced from the income returned. These

aspects has been culled out during the course of hearing. The Assessing Officer's order in this regard reads as under:

Exchange Difference Gain

During the year under consideration, assessee has earned exchange difference gain of Rs.90,68,46,429/- in respect of sales. The assessee has reduced from purchase cost and finally net gain of Rs.9,11,35,278/- from the purchases. During the assessment proceedings, assessee has submitted that the forward and derivative contracts outstanding from 31/3/2010 were revalued and net effect of this mark to market item was at Rs.58,96,91,773/-. The assessee submitted that method of accounting is consistently followed in connection with all the foreign currency denominated transactions and contracts. Further assessee has submitted in his letter as under:

(a) For the earlier previous year ended on 31.03.2009 corresponding to A Y 2009/2010, mark to market loss on account of revaluation of outstanding forwards contracts amounting to Rs.29,42,23,853/- was not allowed during the course of assessment proceedings u/s. 143(3). This item of loss is reversed during the year under assessment as per the consistent method of accounting and as such the same is also accounted as income for the year under assessment.

(b) No appeal is filed against the above disallowance by the assessee and all the applicable regular taxes have been paid off and the challans filed with your office from time to time. In view thereof, for this year under assessment, the reduction in the taxable income is required to be made to the extent of Rs. 29,42,23,853/- to mitigate double taxation of the same item in two years.

Reply of the assessee was considered, but found not acceptable. Since assessee has himself offered exchange gain difference for taxation in the return of income. The return of income declared by the assessee cannot be reduced. Assessee was fully aware about the facts and figures of his case and he has computed income accordingly. Return of income declared by the assessee will be computed as his declaration in the return of income and further addition will be made in the return of income.

9. Thus, from the above, it is apparent that the Assessing Officer has not been able to properly appreciate the issue, but it is emanating that the assessee wants a reduction of Rs.29,42,23,853/- from the income returned which is not being allowed by the Assessing Officer. The Id. Commissioner of Income Tax (Appeals) in his order appreciated the facts as under:

5. The second issue is regarding not given credit of an amount of Rs.29,42,23,853 which was already taxed in the earlier year. As seen from the facts of the case the appellant by following Accounting Standard-11 (AS-11) accounted foreign exchange fluctuation losses/gains consistently in its books of account on mark- to-market (MTM) basis. The exchange fluctuation loss /gain of forward contracts(FCs) were also accounted by following the above method by adopting the exchange rate as on the end of the year for the accounting purpose. The details of loss and again declared or a period of time are as under-

AY 2008-09 loss (Rs. 7,94,94,902)
AY 2009-10 loss (Rs.29,42,23,853)
AY 2010-11 gain Rs.58,96,91,773

The AO treating that the loss accounted for earlier years is on speculation, has disallowed the losses of earlier years and accepted the gain disclosed for the present assessment year. However, even though the loss declared of Rs. 7,94,94,902 was disallowed for AY2008-09, having convinced with the argument of the appellant that the loss incurred on MTM is not a speculation loss but notional loss determined at the end of the year for accounting purposes, while concluding the assessment for AY 2009-10 the AO has reduced the losses of Rs.7,94,94,902 for AY2008-09 from the losses of Rs.29,42,23,853 reported for AY 2009-10 and only the balance of Rs. 21,47,28,951 (29,42,23,853-7,94,94,902) was disallowed vide his assessment order for AY 2009-10 dated 11.3. 2013. While concluding the assessment for the present assessment year i.e. AY 2010-11, the AO has not considered the request of the appellant for similar adjustment from the gains declared for the year since that would lead to assessment of income below the returned income.

10. Thereafter, considering the assessee's submissions, the Id. Commissioner of Income Tax (Appeals) brought on record further following facts:

5.2 I have carefully considered the facts and circumstances of the case and submissions made by the learned AR. I have also consider the decisions relied on by the learned AR. As seen from the facto of the case the total exchange gain offered for taxation during the year by the appellant including the gain from PCs is Rs. 90,68,46,428. Out of this the net gain out of PCs was arrived at by the appellant as under-

FC gain(exports)	Rs.61,09,78,777
FC loss(imports)	<u>Rs. 2.12,87,004</u>
Net gain	Rs.58,96,91,773

After taking into those exchange gains the appellant has filed its return of income and disposed taxable income as 36,23,15,625. The AO after making disallowance of Rs. 24,84,689 u/s 36(1)(iii) has concluded his assessment under section 143(3) on 20.2. 2014 by determining taxable income at Rs. 36,48,00,314. The learned AR

has submitted in the course of appellate proceedings that having consistently followed AS-11 the AO was convinced that the losses disclosed on earlier years are not speculation losses therefore they need to be allowed to be claimed as expenditure during the year. Accordingly the AO while concluding the assessment for AY 2009-10 has given credit for the loss disallowed in AY 2008-09 of Rs. 7,94,94,902 and disallowed only the balance of Rs. 21,47,28,951 (29,42,23,853-7,94,94,902) for AY 2009-10. The AO has made the following remarks in the assessment order for AY 2009-10 as under-

"6.6 In the last assessment year i.e. assessment year 2009-09 an amount of Rs.7,94,94,902/-was disallowed being notional and speculative. However, for the current assessment year this amount becomes an opening amount, credit of which is to be allowed before disallowing any amount. Therefore, the net disallowance this year is computed at Rs.21,47,28,951/-."

The appellant has not preferred any appeal before the CIT(A) for the earlier two years. Before the AO during the course of assessment proceedings of the present assessment year the appellant has requested for the adjustment of Rs.29,42,23,853 pertaining to AY 2009-10 from the income disclosed during year. Even though the AO was well convinced with regard to adjustment of losses disclosed by the appellant as was evident from his order for the AY 2009-10, he did not yield to the request of the appellant for the only reason that it will go down the declared income of the appellant.

11. Thereafter, referring to certain case laws, the Id. Commissioner of Income Tax (Appeals) concluded as under:

5.2.2 It is evident from the above decisions that there is no bar to allow the genuine claim of the appellant even if that leads to assessing the income below the returned income and results in refund. The instant case is still a straight one. In this case the appellant has been showing the actual results of loss/gain from foreign exchange fluctuations year after year by following AS-11 and it is only the AO who was disturbing it by taking a different view. However, after realizing that his stand is not correct, has allowed the claim of the appellant for AY 2009-10. His only inhibition is that if the claim of the appellant is entertained in the present assessment year again,, it will result in assessment below the returned income. Keeping in view the facts of the case in the light of above rulings I, hereby direct the AO to consider the claim of the appellant and give credit to the loss determined for AY 2009-10. The ground is allowed.

12. Against the above order, the Revenue is in appeal before us.

13. We have heard both the counsel and perused the records. Principally, we find ourselves in agreement with the stand of the assessee and view taken by the Id. Commissioner of Income Tax (Appeals). However, we note that the facts of the issue are not clearly emanating out of the records. What is being claimed is that a sum of Rs.29,42,43,853/- being provision for mark to market loss was disallowed by the Assessing Officer in the preceding assessment year. However, we note that in the assessment order of last year, the disallowance was only Rs.21,46,28,951/- in the final computation of income. Now the assessee's plea is that the assessee has not filed the appeal against the disallowance. However, in the current assessment year it has passed a reversal entry debiting the provision and crediting the profit and loss account by Rs.29,42,23,853/-. The assessee claims that this has been done to give effect to the disallowances made by the Assessing Officer earlier. Prima facie, we find that the assessee's making a reversal entry of a sum of Rs.29,42,23,853/- for effecting the disallowance earlier amounting to Rs.21,47,28,951/-. Hence, apparently, there is some discrepancy in the claim made and the disallowance earlier done. However, in our considered opinion, this issue needs to be examined by reference to the actual books of account and the entries therein. If the facts narrated by the Id. Counsel of the assessee are to be applied, there is a reversal entry debiting the provision and crediting the profit and loss account by sum of Rs.29,42,23,853/- which represents the disallowances made in the earlier year. In our considered opinion, this issue needs to be examined by the A.O. with reference to the books of account. Hence, we remit this issue to the file of the Assessing

Officer. The Assessing Officer is directed to examine this issue afresh after giving the assessee proper opportunity of being heard.

14. In the result, this appeal by the Revenue stands partly allowed.

परिणामतः राजस्व की अपील आंशिक स्वीकृत की जाती है ।

Order pronounced in the open court on 09.04.2018

Sd/-
(Ravish Sood)

न्यायिक सदस्य / Judicial Member

Sd/-
(Shamim Yahya)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 09.04.2018

व.नि.स./Roshani, Sr. 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)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai