

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'E': NEW DELHI)**

**BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

**ITA No: 4463/Del/2014
(Assessment Year: 2010-11)**

M/s Nalini Jewellers, 16/2646-49, Bank Street, Karol Bagh, New Delhi.	Vs	The Assistant Commissioner of Income Tax, Circle-33(1), New Delhi.
PAN No: AAEFN2292D		
APPELLANT		RESPONDENT

Assessee by : Shri Nishant Datta, Adv.
Revenue by : Ms. Rakhi Vimal, Sr. DR

ORDER

Per Anadee Nath Misshra, AM

(A) This appeal by Assessee is filed against the order of the Learned Commissioner of Income Tax (Appeals)-XXVI, New Delhi, ["Ld. CIT(A)" for short], dated 23.05.2014, for Assessment Year ("A.Y.", for short) 2010-11, on the following grounds:

- "1. That Learned ACIT and CIT(A) has erred in law and on facts while treating Rs. 1,03,93,854/- being the "loss of gold desk account" as speculative loss.*
- 2. That the learned CIT(A) has not appreciated the facts of the case, explanation offered & proceeded to hold the loss of Rs. 1,03,93,854/- as speculative loss.*

3. *That the learned CIT(A) has further erred in law and on facts while holding that proviso (a) to section 43(5) is not applicable to the facts of the appellant's case.*
4. *That the appellant requests for leave to add or amend the grounds of appeal before the appeal is heard and disposed off.*

Accordingly, it is submitted that relief as prayed above may kindly be granted."

(B) At the outset, Ld. Counsel for assessee brought to our notice that identical issues were decided by Co-ordinate Bench of Income Tax Appellate Tribunal ("ITAT", for short) in assessee's own case by Co-ordinate Bench of ITAT, Delhi, vide order dated 27.04.2018 in ITA No.- 4463/Del/2014 for Assessment Year 2010-11 wherein the assessee's appeal was dismissed and revenue's appeal was partly allowed for statistical purposes; and it was held as under:

"4.9 We have heard the rival submission and perused the relevant material on record. The facts in respect of the transaction brought on record by the Ld. CIT(A) have not been disputed by the Ld. counsel of the assessee. The assessee is contesting that forward contract transaction of Gold are hedging transactions, whereas according to the Assessing Officer, no supporting documents have been filed. The hedging transactions can be illustrated as under:

"For example, imagine an exporter has got an export order of jewellery, say 1000 grams on 01/04/2008, which has to be supplied within 3 months, say by 30/6/2008. The price of pure gold per 10 gms as on 01/04/2008 is say Rs. 30,000/-. The exporter purchases the gold and start manufacturing of the jewellery. The exporter apprehends that the prices of gold may go up or may go down as on the date of jewellery finally exported to the buyer i.e. 30/06/2008. In case, the price of gold goes up, the exporter get more value of the jewellery due to rise in the price of the gold, however, if the price, goes down the exporter will get less value of the jewellery as compared to the value of the date of purchase. In order to eliminate the risk of loss on sale of jewellery, if any due to fall in price of gold on the date of booking of sales as compared to prices on the date of purchase, the exporter enters into a forward contract with bank or any authorized person on 01.04.2008 for sale of gold on the future date (which may be around the date of supply of jewellery to the buyer, say 30.06.2008), on the same price on which, the exporter has

purchased the gold i.e. Rs. 30,000/- per 10 gms. Now, in case the price of the gold on the date of supply of jewellery goes up, say Rs. 40,000/- per 10 gms, then there will be a loss of Rs. 10,000 per gram to the exporter, at the time of settlement of this forward contract transaction, however there will be a gain of Rs. 10,000 per gram in export order supplied. Thus, when both the forward contract transaction and actual supply of the jewellery, are seen in combined manner, there is no loss to the exporter, but when forward contract transaction is seen isolated & accounted separately, there will be a loss of Rs: 10,000 per 10 gms. Similarly, In case the price of the gold goes down say to Rs.20,000/- per 10 gms, in that case at the time of settlement of the forward contract on 30/06/2008, the exporter will gain Rs. 10,000 per 10 gms, whereas in the export order supplied, value of the jewellery will be reduced by Rs. 10,000 per 10 gms and which will be a loss on the export order. But, when we see, both the forward contract transaction and export order in combined manner, there will be no loss to the exporter. In this manner, the exporter has hedged its losses from fluctuation of the gold prices in the market".

4.9.1 In the above example, the forward contract transactions have been settled otherwise than by actual delivery of gold and therefore these transactions will fall in the nature of speculative transactions subject to the exceptions provided in proviso (a) to (e) to the section 43(5) of the Act.

4.9.2 In the facts of the instant case, the issue in dispute is whether the transactions of forward (future) contract of sale of gold to the Bank or the MMTC are speculative transaction or not. For ready reference, the relevant section 43(5) of the Act, defining the speculative transaction is reproduced 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—

(1)

(2)

(3)

(4)

*(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 purposes of this clause—*

(a) a contract in respect of raw materials or merchandise entered into

by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him; or

(b) a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuation; or

(c) a contract entered into by a member of a forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member; [or]

(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 recognised stock exchange; [or]

(e) an eligible transaction in respect of trading in commodity derivatives carried out in a recognised association, which is chargeable to commodities transaction tax under Chapter VII of the Finance Act, 2013 (17 of 2013), shall not be deemed to be a speculative transaction.

4.9.3 Thus, according to the section any transactions of contract for purchase and sale of commodities (here in this case Gold), which is settled periodically, otherwise than by way of actual delivery or transfer of that commodity, the transaction would fall under speculative transaction. However, there are exceptional situations from sub-clause (a) to (e), where these transactions would not be speculative transaction.

4.9.4 In the instant case, there is no dispute that the contracts of sale of gold to MMTC are settled periodically without actual delivery and on the date of settlement of the contract, only difference in market price and the contract price is paid or received by the assessee. Thus under the main definition of the subsection, the transactions are speculative transaction, but the assessee has claimed that its case is covered by proviso (a) and of the said subsection.

4.9.5 The proviso (a) speaks about contract in respect of raw material to guard against any loss in price fluctuation against contract of sale of manufactured goods.

4.9.6 The Ld. CIT(A) has noted that proviso (a) to section 43(5) is not attracted in the case of the assessee as there is no element of loss embedded in respect of the contract for actual delivery of jewellery manufactured and exported by the assessee, which required to be guarded by entering into a contract in respect of the raw material. According to the Ld. CIT(A), the assessee has entered into forward contract with bank to guard the loss through future price fluctuation in respect of the purchase of pure gold.

4.9.7 In our opinion, object of entering into forward contract transaction has to be seen from the contract agreements and underlying assets. In the case of the assessee for claiming benefit of clause (a) of Section 43(5) of the Act, its forward contract transactions should have been corroborated one by one, with the purchases of gold and supply of jewellery manufactured. Before the Assessing Officer, the assessee failed to correlate these forward contractor transactions of gold and

corresponding purchases and export of jewellery. Even such details have not been filed either before the Ld. CIT(A) or before us. Thus, on this ground, the assessee cannot be allowed the benefit of proviso (a) to section 43(5) of the Act in absence of any documentary evidences to support its contention of fulfilling conditions of proviso (a) to section 43(5) of the Act. .

- 4.9.8 *Further, the Ld. CIT(A) has distinguished the facts of the case with the facts of the case of London Star Diamond company. In the said case forward contracts were entered into with banks for hedging foreign exchange loss on outstanding receivables in foreign currency. In the said case there was one to one correlation between the forward contracts and the export invoices but in the instant case the assessee has failed to correlate underlying asset with the forward contracts entered into by the assessee. We agree with the finding of the Ld. CIT(A) that the facts of the case of London Star Diamond company are distinguishable from the facts of the assessee and accordingly ratio of the said decision is not applicable over the facts of the instant case.*
- 4.9.9 *The Ld. CIT(A) has also relied on the rule of consistency as laid down by the Hon'ble Supreme Court in the case of Radhasami Stasang 193 ITR 321 in view of the loss treated by the assessee as speculative loss in the preceding assessment year.*
- 4.9.10 *In view of the above discussion, we uphold the decision of the Ld. CIT(A) on the issue in dispute. The grounds of the appeal of the assessee are accordingly dismissed.*
5. *The ground Nos. 1 to 4 of the appeal of the revenue relates to holding the transaction of foreign currency forward contracts amounting to Rs.99,22,176/-as speculative by the Ld. CIT(A).*

5.1 *Before us the Ld. DR submitted that this amount was declared by the assessee itself as business profit in the return of income filed and therefore the Assessing Officer did not look into whether the transactions could be in the nature of speculative or not. According to him, the Ld. CIT(A) on the basis of his finding in respect of forward contract transaction of Gold, treated the gain from foreign currency forward contract transaction as speculation gain without looking into the documentary evidences of such transactions, which were already admitted by the assessee as business transaction. According to him, whether these transactions could be considered as speculative transaction, need to be examined in the light of supporting contract agreements and documentary evidences.*

5.2 *The Ld. AR, on the other hand, relied on the order of the Ld. CIT(A).*

5.3 *We have heard the rival submission and perused the relevant material on record. We note that the gain of Rs. 99,22,176/-from foreign currency forward contracts was offered to tax by the assessee as business gain and, therefore,, the Assessing Officer did not feel to go into examining, whether it was speculative in nature. We also find that the Ld. CIT(A) has held the transactions as speculative in nature with following finding:*

"5.3 I have carefully considered the submission of the appellant and perused the record. I am of the considered view that the Assessing Officer has erred in holding the gains arisen from forward contracts in respect of ' Foreign Currency I as business income thought he has placed reliance on the decision in the case f K Mohan & Company (Export) (P) Ltd. (2010) 130 TTJ 719. However, the nature of

forward contracts in respect of 'Foreign Currency' as mentioned above is speculation. Thus, both types of transaction; forward contracts in respect of 'pure gold' and forward contracts in respect of 'foreign currency' being similar has to be treated on the same footings. Thus, it is hereby held that the profit of Rs. 99,21,176/- derived on account of forward contracts in respect of 'Foreign Currency' as mentioned above is speculative profit/gains and not the business income as held by the AO. Accordingly, it is held that the profit of Rs. 99,22,176/- derived on account of Forward contracts in respect of 'Foreign Currency' being speculative profit has to be set-off against the loss of Rs. 1,03,93,854/- debited in gold desk account. Consequentially, the addition of Rs. 1,03,93,854/- is restricted to Rs.4,71,678/-. The AO shall give consequential relief."

5.4 On perusal of the above finding, we note that the Ld. CIT(A) has decided the issue in view of the facts noted in the case of forward contract transactions of the gold and no documentary evidence in support have been referred in his findings on the issue in dispute.

5.5 In view of the aforesaid facts, we feel it appropriate to restore this issue to the file of the Assessing Officer for deciding afresh after providing adequate opportunity of being heard to the assessee, with liberty to the assessee to file necessary documentary evidence in support its claim. Thus, the ground Nos. 1 to 4 of the appeal of the Revenue are accordingly allowed for statistical purposes.

(B.1) The assessee carried the matter in Hon'ble Delhi High Court and filed appeal under Section 260A of Income Tax Act, 1961 ("I.T. Act", for short) for Assessment Year 2010-11.

Vide order dated 29.04.2019, the Hon'ble Delhi High Court held as under:

"4. We have heard counsel for the parties. The limited relief that the assessee seeks is that even while directing the remand for reconsideration at the behest of the Revenue in its appeal, ITAT failed to appreciate the assessee's contention with respect to the contracts which it claimed were not forward contracts by virtue of proviso clauses (a) & (b) to Section 43 (5) of the Act. The contention was declined on the ground that no correlation between the forward contract transactions of gold and corresponding purchases and export of jewellery was 'established to satisfy the requirements of law. This Court is of the opinion that the assessee's contention has some merit - the earlier portion of the main impugned order specifically noticed the compilation of documents produced during the proceedings, which contained specific contracts and the transactions which the Revenue alleged were speculative.

5. In these circumstances, given that the Revenue's appeal has been remitted, the ITAT's approach in our opinion was not correct. Accordingly, the assessee's question with respect to the verification of the transactions and the correlation with specific contracts shall be examined having regard to the assessee's contentions as

well. ITA 430/2019 and W.P. (C) 4468/2019 are partly allowed in the above terms. The ITAT's impugned order is hereby set aside."

(B.2) Identical issues came up before ITAT in assessee's own case for Assessment Year 2011-12 also. Vide order dated 28.05.2019 for Assessment Year 2011-12 in ITA No. 4531/Del/2015 and 4181/Del/2015; and the issues were set aside to the file of the Assessing Officer to decide, in accordance with decision taken in Assessment Year 2010-11, by following the directions of the Hon'ble High Court. The relevant portion of the aforesaid order dated 28.05.2019 is reproduced as under:

*"7. At the very outset, it is brought to our notice by the Ld. Authorized Representatives of the parties to the appeals that identical issues were decided by the coordinate Bench of the Tribunal in **assessee's own case in IT A Nos,4487/Del/2014 & 4463/Del/2014 order-dated 27.04.2018** by dismissing the appeal filed by the assessee and by partly allowing the appeal filed by the Revenue for statistical purposes. Then, the assessee carried the matter before the Hon'ble Delhi High Court- who has passed the **order dated 29.04.2019 in WP (C) 4468/2019 and ITA 430/2019** by setting aside the matter to the AO to examine the issue with respect to verification of transactions and correlation with specific contracts by returning following findings*

"4. We have heard counsel for the parties. The limited relief that the assessee seeks is that even while directing the remand for reconsideration at the behest of the Revenue in its appeal, IT AT failed to appreciate the assessee's contention with respect to the contracts which it claimed were not forward contracts by virtue of proviso clauses (a) & (b) to Section 43 (5) of the Act The contention was declined on the ground that no correlation between the forward contract transactions of gold and corresponding purchases and export of jewellery was established to satisfy the requirements of law. This Court is of the opinion that the assessee's contention has some merit - the earlier portion of the main impugned order specifically noticed the compilation of documents produced during the proceedings, which contained specific contracts and the transactions which the Revenue alleged were speculative.

5. In these circumstances, given that the Revenue's appeal has been remitted, the ITAT's approach in our opinion was not correct.

Accordingly, the assessee'S question with respect to the verification of the transactions and the correlation with specific contracts shall be examined having regard to the assessee's contentions as well, ITA 430/2019 and W.P.(C) 4468/2019 are partly allowed in the above terms. The ITAT's impugned order is hereby set aside. "

8. We are of the considered view that since the identical issues for AY 2010-11 are already pending adjudication by the AO having been remanded by the Hon'ble Delhi High Court, the same issues qua for the year under assessment are also required to be remanded back to the AO to decide in accordance with the order passed by the Hon'ble High Court. Consequently, both the appeals are set aside to the AO to decide in accordance with the decision taken in AY 2010-11 by following the directions by the Hon'ble High Court. Consequently, both the appeals filed by the assessee as well as Revenue are allowed for statistical purposes."

(B.3) Similarly, identical issues once again came up before ITAT for Assessment Year 2012-13 in assessee's appeal. Vide order dated 11.07.2019 in ITA No.- 2178/Del/2016; Co-ordinate Bench of ITAT, Delhi, remanded the matter back to the file of the Assessing Officer; holding as under:

"6. During the hearing for the assessment year 2012-13 ,both the representatives have argued that the matter be remanded back to the file of the AO to examine the issue afresh in the light of judgment of the Hon'ble High Court for the assessment year 2010-11. Hence, we hereby direct the AO to verify the transactions and correlate the same with the specific contracts. The AO is also directed to consider the order off the Hon'ble High Court of Delhi at New Delhi vide W.P.(C) 4469/2019 CM APPL. 19848/19 and to consider the forward contracts with relation to the provision to Clause (a) and (b) to Section 43(5) of the Income Tax Act, 1961 in accordance with the provisions of the Income Tax Act."

(C) At the time of hearing before us, the Ld. Counsel for assessee submitted that the issue in dispute being identical in the present appeal; be also remanded back to the file of the Assessing Officer for fresh order in accordance with aforesaid order dated 28.05.2019 of Hon'ble Delhi High Court; by following the precedents in assessee's own case in aforesaid orders dated 28.05.2019 and 11.07.2019 passed by Co-ordinate Benches of ITAT, Delhi. The Ld. Counsel for assessee submitted that facts and circumstances for this year i.e. Assessment Year 2010-11 are identical to the facts and circumstances for Assessment Years 2010-11 , 2011-12 and 2012-13 to which the aforesaid orders dated 29.04.2019, 28.05.2019 and 11.07.2019. The Ld. Departmental Representative ("Ld. DR", for short) agreed with the submissions of the assessee.

(D) We have heard both sides. We have perused the materials available on record. We have also considered the precedents which were brought to our attention, at the time of hearing. It is not in dispute that on identical issues in dispute, the facts and circumstances for this year are identical to facts and circumstances for Assessment Years 2011-12 and 2012-13 to which the aforesaid orders dated 29.04.2019, 28.05.2019 and 11.07.2019 pertain. No distinguishing facts and circumstances have been brought to our attention by either side to persuade us to take a view different from view taken by Co-ordinate Bench of ITAT, Delhi in aforesaid orders dated 28.05.2019 and 11.07.2019 for Assessment Years 201-12 and 2012-13 respectively. In view of the foregoing, and as both sides have agreed to this at the time of hearing before us, we set aside the order of the Ld. CIT(A) and restore the issue in dispute in the present appeal before us to the file of the Assessing

Officer with the direction to pass fresh order given by in accordance with direction Hon'ble
Delhi High Court for Assessment Year 2010-11 vide aforesaid order dated 29.04.2019.

(E) In the result, appeal filed by assessee is partly allowed.

Order pronounced in the Open Court on 04/12/2019.

Sd/-
(H.S. SIDHU)
JUDICIAL MEMBER

Sd/-
(ANADEE NATH MISSHRA)
ACCOUNTANT MEMBER

Dated: 04/12/2019
Pooja/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	