

IN THE INCOME TAX APPELLATE TRIBUNAL "A", BENCH KOLKATA

BEFORE SHRI S. S. GODARA, JM & Dr. A. L. SAINI, AM

आयकर अपीलसं./I.T.A Nos.852 to 856/Kol/2018

(निर्धारण वर्ष / Assessment Years: 2005-06 to 2007-08 & 2011-12 to 2012-13)

M/s. Ratnabali Commodities Pvt. Ltd.	Vs.	ITO, Ward-12(3), Kolkata / JCIT, Range-12, Kolkata
Flat No.A-7 & A-8, 4 th Floor, FMC Fortuna, 234/3A, AJC Bose Road, Near Minto Park, Kolkata – 700020.		
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAACU3187F		
(Appellant)	..	(Respondent)

Appellant by : Lata Goyal, ACA

Respondent by : Shri Dhrubajyoti Ray, JCIT, Sr. DR

सुनवाईकीतारीख/ Date of Hearing : 23/12/2019

घोषणाकीतारीख/Date of Pronouncement : 31/12/2019

आदेश / O R D E R

Per Shri S. S. Godara:

These assessee's five appeals for assessment years 2005-06 to 2007-08 & 2011-12 to 2012-13 arise against the Commissioner of Income Tax (A) - 4, Kolkata's common order dated 09.03.2018 passed in case nos.1098,1096,1097,890 & 1907/CIT(A)-4/11-12/14-15 involving proceedings u/s 143(3)/147 of the Income Tax Act, 1961 (in short 'the Act') in former three and u/s 143(3) of the Act in the latter two assessment years, respectively.

Heard both the parties. Case files perused.

2. A combined perusal of the assessee's pleadings in all these cases reveals that the sole substantive issue that arises for our apt adjudication on merits is that of correctness of both the lower authorities' action invoking section 36(1)(iii) interest expenses disallowance amounting to Rs.1,24,511/-, Rs.8337/-, Rs.5,30,260/- Rs.22,66,386/- and 16,58,339/-; assessment years wise, respectively.

The assessee's former three appeals ITA No.852 to 854/Kol/2018 assessment year 2005-06 to 2007-08 also challenges validity of the impugned reopening. With the consent of both the parties, we proceed to deal with the above stated former issue on merits. Learned representatives invited our attention to the CIT(A)'s detailed discussion affirming the Assessing Officer's action treating the assessee's commodity held as investments than stock-in-trade as follows:

"4. Ground Nos.2 & 3 are regarding treating the activity of purchase of gold as an investment activity and consequent disallowance of interest of Rs.1,24,511/-. The A.O. has observed the following in the assessment order substantially -

(1) that the assessee has made substantial purchase of gold over the years but there has been no sales during last few many years.

(2) The assessee has taken substantial amount of loan to acquire these commodities and paid substantial interest on the said loan.

The A.O. has concluded that the assessee has not sold a single item of gold in last few years and that the assessee wanted to hold the commodity for longer period of time to get long term benefit and such activities is nothing but investment activity. The A.O. has treated the interest on loan which has been used for purchase of these commodities as not an allowable business expenditure.

4.1 The Ld. A/R has made the following submission -

"4.1 During the relevant FYs, the assessee paid interest of Rs. 1,24,511/-, Rs.8,337/- and Rs.5,30,260/- on borrowed funds, a part of which was utilized in purchases of gold. In course of re-assessment, the AO noted that no sales were affected by the assessee so in the FYs i.e. 2003-04 to 2006-07. On this premise along he held the activity of purchase of gold to be an activity in the nature of investment and hence disallowed the entire interest paid by the assessee u/s.36(1)(iii).

4.2 With regard to the aforesaid addition a few facts are clarified at the outset. The assessee is company incorporated with the object of carrying on business as a member of commodities exchanges and to enter into transactions in commodities of all types on own account and on behalf of its clients. In pursuance of such business of transacting in commodities the assessee entered into commodity transactions involving huge sums regularly. The following chart shows the various transactions entered into by the assessee from FY 2003-04 to FY 2010-11 (Audited Accounts enclosed in paper book for AY 2009-10):

Commodity/Financial Year	2003-04			2004-05			2005-06		
	Purchase		Sale	Purchase		Sale	Purchase		Sale
	Kg.	Rs.		Kg.					
Gold	1	6,07,256	-	5	33,25,008	-	5	34,85,413	-

Commodity Financial year	2006-07			2007-08			2008-09		
	Purchase		sale	Purchase		sale	Purchase		sale
	Kg.	Rs.		Kg.	Rs.		Kg.	Rs.	
Gold	5	50,10,443	-	10	87,75,578	-	-	-	-

Commodity/Financia l year	2009-10				2010-11			
	Purchase		Sale		Purchase		Sale	
	Kg.	Rs.	Kg.	Rs.	Kg.	Rs.	Kg.	Rs.
Gold	0.5	70,700	0.5	71,750	-	-	-	-
Silver	30.205	7,96,807	-	-	-	-	30.205	8,61,930
Castor Seed	-	-	-	-	4,57,500	1,42,76,250	4,57,500	1,45,89,937

4.3 The above table shows that the commodity transactions were entered into by the assessee regularly, in pursuance of the object clause to the memorandum of association. The said commodities have been shown as stock in trade in the Balance Sheet. Further, the profit on the sales affected in FY 2009-10 was offered as business income and not as capital gains.

4.4 Attention is now invited to the balance sheet and P/L of the assessee company for FY 2010-11. From the perusal of the same it is seen that various expenditures like salary, legal & professional fees, telephone expenses, computer expenses etc. were incurred by the assessee. The same proves that in order to transact in the commodity markets, the assessee undertook organized set of activities and developed the infrastructure needed to support such activities. It obtained the membership of MCX and NCDEX for which it had to make huge security deposits with the exchanges and had to incur ongoing membership fees. The various expenditures debited to the P/ L clearly prove the efforts made by the assessee to undertake the business (of transacting in commodities market) in an organized and systematic manner. In fact, the AO has allowed all the expenditure debited to the P/L, thereby accepting the existence of business.

4.2 Thereafter, the Ld. A/R has relief on the following case laws -

i) *Investment Ltd. v. Commissioner of Income-tax* [77 ITR 533]

ii) *Karnani Properties Ltd. v. CIT* [82 ITR 547]

iii) *Mafatlal Holdings Ltd. vs. ACIT* [85 TTJ 821]

The Ld. A/R has further submitted the following -

"Lastly, it is submitted that the CIT(A)-XXX has held in favour of the assessee in its own case for AY 2008-09 on identical facts. Following the said order, your predecessor i.e. CIT(A) XII allowed the interest expenditure for AYs 2009-10 & 2010-11 CIT(A) order for A.Y. 2008-09 enclosed in paper book for AY 2009-10. The Appeal filed by the Department against the said orders of CIT(A) has been dismissed by the Hon'ble Tribunal implying the finality of the order of CIT(A). Thus following the order passed by predecessor in earlier FYs it is prayed that the interest expenditure incurred by the assessee in the relevant FYs be allowed.

Conclusion:

Thus from the above it is clear that the purchase of gold was undertaken by the assessee in course of its business of dealing in commodities, which in turn was undertaken by the assessee in an organized and systematic manner. Therefore, the said purchase of gold was clearly for purposes of business and. hence interest paid on funds borrowed for purchase of gold should be allowed u/ s 36(1)(iii)."

I have perused the assessment order, the submission of the Ld. A/R and also case laws on the subject and appellate orders of ITAT for assessment years 08-09, 09-10 and 10-11. It is seen that Hon'ble ITAT had dismissed the appeal of the revenue because of tax effect. No findings have been given on merit.

The Ld. A/R has referred to the decision of CIT(A) for assessment year 2008-09 where the CIT(A) has decided the issue in favour of the assessee. However, it is seen that additional facts has been discovered during current appellate proceedings like deployment of fund for non trading activity and trade license for tax professional work. In view of these fresh evidences the order of CIT(A) for A.Y. 2008-09 would not apply to other years.

4.3 During the course of appellate proceedings, the A/R was asked to submit following details -

"Sub:- Appeal Nos.343, 346, 345, 890 & 1907/CIT(A)-4/ in the case of Ratnabali Commodities Pvt. Ltd., for the A.Yrs.- 2005-06, 06-07, 07-08, 11-12 & 12-13 - Matter regarding.

In the instant case, please furnish following details -

- 1. Copy of trade license.*
- 2. Whether trade license has been taken for trading in gold.*
- 3. Detail of sale of gold subsequent to F.Y. 10-11 till December, 2017.*
- 4. Whether VAT has been paid on sale of gold with proof.*
- 5. Utilization of sale proceeds on the sale of gold till December, 2017. Please produce copy of Bank Statement in support of the utilization.*

Please appear with these details on 23.02.2018 at 10-30 A.M'

4.4 Consequent to this, the assessee has filed the details. From the detail files it is seen that during F.Y. 2006-07 the name of the company is Unifin Investment Services Pvt. Ltd. and the nature of business shown is a Professional Tax Consultants. The A/R has not submitted the trade license for F.Y. 04-05, 05-06 but it is obvious that in earlier years also the nature of business would be of tax consultancy. The trade license for F.Y. 2011-12 show that the assessee-JE-d-commodity broker. Therefore till F.Y. 20 11-12 the assessee has not shown itself as a commodity trader.

4.5 Further the assessee has filed a chart showing deployment of fund obtained on sale of gold. The charge is part of the appeal order vide Annexure-A. From the chart, it can be seen that most of the sale proceeds have been used not for trading purpose but for capital purposes. Therefore, the intention of the assessee in purchase and sale of gold seems to be in the nature of investment and not in the nature of trading.

4.6 Analysis of case laws- In the case of Investment Ltd. Vs. CIT 77 ITR 533 (SC) Hon'ble Supreme Court had held that description shown in the Balance Sheet is not relevant. Hon'ble Court had inter alia held that the magnitude of transaction is also relevant factor. In the instant case, the assessee has no sale in gold for years together. Therefore, the nature seems to be of investment.

In the case of CIT vs. Holck Larsen Court has held following tests for deciding whether it is a capital gain for adventure in the nature of trade-

- The subject matter of the realization.*
- Commodities, regular yield or personal enjoyment.*
- The length of the period of ownership.*
- Frequency of similar transactions by same person.*
- Supplementary work on or in connection with the property realized.*
- Circumstances that were responsible for realization. Emergency utilization of funds, etc.*
- Motive – Transaction of purchase and sale clearly discernible.”*

In the instant case, there is hardly any frequency of trade. Further, the motive of the assessee seems to be clearly hold the gold for long period of time and realize capital appreciation and also the fund realized on sale gold has been used for investment purposes. The length of ownership of gold is very long. Therefore, it seems to be in the nature of investment as held by Hon'ble Court.

The case laws cited by learned counsel are distinguishable on fact.

4.7 In view of the above discussing, I am of the opinion that the assessee's nature of business is investment and, therefore, the AO has rightly disallowed the interest expenditure. Therefore, ground nos. 2 & 3 are dismissed.”

3. We have given our thoughtful consideration to rival contentions. It emerges during the course of hearing that the Assessing Officer invoked his reopening jurisdiction in former three assessment years based on the corresponding findings in assessment year 2008-09 only treating the assessee as an investor in commodities. It has further come on record that the CIT(A)'s order in the said assessment year (supra) has already decided the issue against the department. The Revenue's only case is that its appeal in the said assessment year filed before the tribunal was dismissed on account of lower than the prescribed tax effect than on merits.

4. Learned departmental representative strongly supported both the lower authorities' action that the impugned interest amount has been rightly disallowed in all these assessment years since the assessee has been held as an investor in commodities only. And also that has chosen not to sell the alleged commodities thereby withholding the same for a longer duration to time and therefore, the impugned internal disallowance relating to commodity investments is liable to be affirmed. We find no merit in Revenue's foregoing arguments. Case file indicates that object clause 'A' in assessee's Memorandum of Association inserted w.e.f. 07.07.2003 vide special resolution of the very day makes it clear that it has been engaged in the business of commodity trading and brokerage from financial year 2003-04 onwards. We further notice that the assessee had held some shares in first assessment year 2004-05 in its closing stock as disposing off during financial year 2005-06 as per page no.48 in the paper book. The sale price realized therefrom was duly recorded in the P & L A/c. The assessee thereafter appears to have changed its nomenclature from "shares and commodities" to "commodities" only. Learned counsel pointed out that this assessee is also registered with the National Commodity and Derivative Exchange Ltd. (NCDEX) and Multi Commodity Exchange of India Ltd (MCX) for the purpose of carrying out its commodity business. And that it had also paid security deposits of Rs.10,00,000/- in financial year 2004-05 and Rs.65,00,000/- in financial year 2005-06; respectively. Learned counsel then pointed out the assessee's opening stock of commodities in P & L A/c, purchase figures, corresponding closing stock figures, interest income derivative from the above security deposits taken as income in P & L A/c as well as identical treatment given to income from commodity brokerage(s). Learned departmental representative fails to dispute the clinching fact that neither of the lower authorities have rejected the assessee's books of account nor there is any material in the case files apart from its so-called longer holding period to conclude that there has been any conversion of the impugned commodities from stock-in-trade head to investments. The assessee company had sold its commodity stock in

assessment year 2011-12 which was taken in profit and loss a/c without claiming any benefit of relaxation regarding capital gains or losses; as the case may be.

5. Lastly coming to the Revenue's stand that this assessee is mainly in professional services (supra) does not form a valid reason on standalone basis to adopt a different approach in all these five assessment years since it has been all along treated as engaged in commodity trading business only. We therefore hold that these both lower authorities have erred in law and on facts in invoking 36(1)(iii) disallowance of interest alleging the assessee to have utilized corresponding secured business loans for the purpose of purchase of commodity investments in question. We accordingly proceed to delete the impugned section 36(1)(iii) interest disallowance in all these five assessment years (supra). The assessee succeeds on merits qua the instant former issue therefore.

6. Coming to the legal issue of validity of reopening in former fresh assessment year (supra), we conclude that since we have already deleted the impugned disallowance on merits, it is rendered academic as per learned counsel's fair submissions made during the course of hearing.

7. The assessee's former three appeals ITA No.852 to 854/Kol/2018 are partly allowed and latter two cases ITA No.855 & 856/Kol/2018 are allowed in above terms. A copy of this order be placed in the respective case files.

Order is pronounced in the open court on 31.12.2019.

Sd/-
(A. L. Saini)
ACCOUNTANT MEMBER

Sd/-
(S. S. Godara)
JUDICIAL MEMBER

कोलकाता /Kolkata;
दिनांक/ Date: 31/12/2019
(RS, Sr.PS)

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. The Appellant - M/s. Ratnabali Commodities Pvt. Ltd.
2. The Respondent- ITO, Ward-12(3), Kolkata / JCIT, Range-12, Kolkata
3. आयकरआयुक्त(अपील) / The CIT(A), Kolkata [sent through email]
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT, Kolkata [sent through email]
6. गार्डफाईल / Guard file.
सत्यापितप्रति

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By Order

Assistant Registrar,
I.T.A.T, Kolkata Benches,
Kolkata.