IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT
AND SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.370/Bang/2022
Assessment Year : 2013-14

M/s. Rajarathnam's Jewels, B-12, Devatha Plaza, Bengaluru – 560 025. **PAN : AABFR 5632 E**	Vs.	ACIT, Circle – 1(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. H. Anil Kumar, CA
Revenue by	:	Shri. K. R. Narayana, Addl. CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	10.08.2022
Date of Pronouncement	:	28.10.2022

O R D E R

Per Shri Laxmi Prasad Sahu, Accountant Member:

This is an appeal by the assessee directed against the Order of Assessment dated 16.03.2022 of National Faceless Assessment Centre, Delhi, (hereinafter referred to as the Assessing Officer, "AO" in short) passed under section 143(3) of the Income Tax Act, 1961 (Act) in relation to Assessment Year 2013-14.

2. The Assessee is a partnership firm. It is in retail business of selling gold jewellery, silver articles, diamond and platinum since 1980.

3. There was a survey conducted under section 133A of the Act by the Revenue on 16.03.2001 in the business premises of the assessee. We will

refer to this Survey as the "First Survey". At the time of the said survey, stock of gold and diamond jewellery physically found was 46,078.73 gms. The assessee explained and reconciled the stock so found as follows:

Gold and diamond Jewellery found on the date of the survey 16.03.2001 in shop as worked out		*A*	*46,078.73 gm*
i)	*Gold and Diamond jewellery of the 2 partners and 2 family members*	*17,319.00 gm*	
ii)	*Customers gold(Gold of Gold Scheme & Gold and diamond jewellery received for job work)*	*2,222.00 gm*	
iii)	*Own stock*	*25,179.00 gm*	
		B	*44,720.00 gm*

Excess A – B = 1,358.73 gm
and value of excess stock found Rs 5,43,492 was offered as income.

4. It can be seen from the above reconciliation that the Assessee explained that gold and diamond jewellery to the extent of 16,3063 gms. and 1,013 gms. belonged to the partners and customer gold of 2,222 gms. were kept with the assessee in trust and hence not to be regarded as stock-in-trade of the firm. The plea of the assessee was that the assessee received from partners Sriyut Rajesh B. Chand and Vivek B. Chand, Gold and Diamond Jewelleries for deposit as mentioned in Schedule to the Instrument of Bilateral Understanding for Deposit of Gold (hereinafter referred to as the Deed of Deposit) dated 01.11.1998. As per clause-5 of deed of deposit, the partners agreed not to charge any fee for the right to use partner's gold and diamond. Clause – 5 reads as follows:

> ***"As the deposit is into the firm in which the depositor is a partner, in the interest of fair business dealing, presently no Return (user fee) is payable on the Deposit. This is subject to revised stipulation by mutual agreement supported by an "ADDENDUM" to this instrument."***

5. Clause No. 9 of the Deed of Deposit, gave the assessee a right to convert the deposited Gold and Diamond Jewellery suitable to its requirements and it reads as follows:

> ***"By virtue of the nature of deposit (unlike cash), the acceptor has the rights of conversion of the subject matter of deposit of Gold and Diamond Jewellery suitable to the requirements of the business and business customs to which right the Depositor doth hereby convey his unequivocal consent."***

6. Clause No. 10 of the deed of deposit provided that on termination of the period of three years, the Assessee has to return not the original gold/diamond jewellery but only equivalent quantity of Gold or Diamond jewellery. The said clause reads as follows:

> ***"The Acceptor doth hereby assure the Depositor that on termination of the deposit by effluxion of duration or otherwise by exigencies of circumstances, the Depositor shall have the right to withdraw in specie the total quantity involved in the subject matter of deposit of Gold and Diamond Jewellery without any reservation whatsoever."***

7. Though the term of deposit as per deed of deposit between the partners Mr. Rajesh B. Chand and Mr. Vivek B. Chand was only for 3 years, the deposit of Gold and Diamond Jewellery according to the assessee, continued and holds good even today.

8. Two other family members of the partners of the Assessee, Smt Pratibha Chandrasekar, wife of Sri B.N. Chandrasekar and Smt Latha Rajesh, wife of Sri Rajesh B. Chand also deposited Gold and Diamond Jewelleries, under a deed of deposit dated 1.5.1999. Except for Clause No. 5, the other understandings (Terms) the other terms were similar to the one signed between partners Rajesh B. Chand and Vivek B. Chand and the Assessee. The family members charged a user fee from the Assessee for use of their jewellery. Clause-5 of the deed of deposit dated 01.05.1999 provided as follows:

> ***"The Acceptor doth hereby agree to pay the depositor for every English calendar month from the date of deposit, user fee of Rs. 4,000/- (Rupees Four Thousand Only) per month and the same (user fee) shall be paid to the depositor not later than 10th of the succeeding English calendar month. Presently, this stipulation with regard to user fee shall hold good throughout the duration of the deposit specified supra, subject to such variation as the Depositor and Acceptor may mutually agree."***

9. Thus, these two family members charged the firm fee for right to use their jewellery. Though the agreement was initially for 3 years, the deposit of Gold and Diamond Jewellery continued on the same terms for further years ended on 31.03.2006 paying user fee of Rs. 48,000/- per year each to Smt. Pratibha Chandrasekar and Smt. Latha Rajesh. The user fee paid to these two persons increased to Rs 96,000 in the next year as against Rs 48,000. The total user fee of Rs. 96,000 per year was claimed per person

afterwards as expenses of each year and reported by Chartered Accountants in their report in 3CD as required under the Act.

10. The Plea of the Assessee with regard to partner's Gold having been kept with the firm and customers gold having been kept with the firm in trust was accepted by the revenue and the revenue did not treat the said quantity of gold and diamond jewellery as belonging to the firm and no addition in the assessment completed for AY 2001-02 after the Survey on 16.3.2001 was made by the revenue authorities.

11. On 25th September 2012, at about 12.15 p.m., the Income Tax Department conducted another survey u/s 133A of the Act. We will refer to this Survey as the "Second Survey". An Inventory of the stock of jewellery was taken. A sworn statement of partner Sri. Vivek B.Chand was recorded on the date of Survey. In answer to Q.No.13 Mr.Vivek B.Chand specifically stated that no stock belonging to others are lying in our business premises or any stock belonging to us is kept anywhere else other than the business premises and that no stock received remains unaccounted. In answer to Q.No.21 it was stated that stock kept in the business premises also contains a small quantity of personal gold jewellery belong to the family members which may be below 500 gms. Apart from this the stock of the firm also include gold belonging to the members of the gold scheme and also the customers gold which are kept with the firm for conversion/alterations, etc. In answer to Q No. 25 it was stated that the Assessee would furnish certain details by 26.9.2012 and complete the valuation of stock.

12. On 26.9.2012, the Vivek B.Chand was examined by the AO and his statement recorded u/s.131 of the Act. In answer to Q.No.5 Mr.Vivek B.Chand stated that 17.319 gms of gold belongs to customers as well as family members out of which 16.306 kgs. belongs to family members. In answer to Q No.8, he stated that 16.306 kgs.belongs to family members. He also confirmed that gold belonging to the family members are used by the firm and an user fee is paid for such usage and that such arrangement existed for last 10 years or so. The gold belong to family members and customers are kept in trust by the firm and in the capacity of trustee. Such stock does not form part of the books of accounts of the firm but gets reflected in balance sheet only. Thus the plea taken by the Assessee, in so far as the quantiy of 16.306 Kg. of Gold was that the same quantity which was accepted as family/partner's Gold in the first survey, continued to remain with the Assessee and the said quantity of Gold should not be considered as the stock belonging to the Assessee.

13. In the course of assessment proceedings before the AO, the Assessee reitered that the quantity of Gold and Diamond Jewellery held in trust are to be excluded from gold and diamond stocks found at any time of Survey to determine stock of gold owned by the assessee at that time. A Letter dated 4.10.2012 was addressed to the AO by the Assessee in this regard wherein it was specifically pointed out that gold and diamond jewellery deposited by partners during the financial year ended 31.3.99 and family members of the partners during the financial year ended 31.3.2000 and accepted at the time of first survey on 16.3.2001 by the then Assessing Officers of the assessee can never be "excess stock of gold to the tune of 16,306 kgs" found on 25.9.2012, the date of second survey u/s 133A.

14. In the course of assessment proceedings, the AO issued notice dated 02.05.2013 informing the Assessee that a special audit of accounts of the Assessee has to be carried out u/s 142(2A) for Assessment Year 2006-07 to Assessment Year 2012-13. The assessee by letters dated 11.5.2013 submitted revised unaudited financial statements for AY 2006-07 to 2012-13 whereby the Assessee took a stand that there is no need to carry out any special audit because on the basis of the revised financial statements filed by the Assessee, income can be easily determined and there is no necessity of special audit. In a revised Balance Sheet for Assessment Years 2006-07 to 2012-13, the assessee included the family jewellery as stock of the assessee on the asset side with a corresponding liability to return the family jewellery on the liability side. However, in the Proft and Loss A/c the stock belonging (allegedly) to the partners was not included at all. The AO once again issued notice u/s 142(2A) dated 07.06.2013. In the said notice AO has mentioned that earlier objection dated 11.05.2013 has been rejected. The AO vide letter dated 16.07.2013 gave a further opportunity regarding Special Audit u/s 142(2A) directing the assessee to appear on 22.07.2013. Ultimately no special audit was directed to be carried out.

15. The assessee thus contended before the AO that the agreements of 1998 and 1999 by which the Gold of the partners and relatives was deposited with the firm was a business practice of the assessee and was known to the Department since 2001 when a survey had been conducted on 16-3-2001 and when the plea of the assessee was accepted by the Revenue.

16. The AO, in the order of assessment, made a reference to the letter of the Assessee dated 4.10.2012 , however made no reference to the plea of the

Assessee that the excess stock of gold weighing 16.306 Kg. belonged to the partners and family members and that in the first survey the department accepted the plea of the Assessee and to that extent the quantity of gold should not be considered as belonging to the firm. The AO gave the following findings in the order of Assessment:

1. The plea of the Assessee that the gold deposited by the partners and family members cannot form part of stock-in-trade of the Assessee because the firm is obliged to return the gold deposit as and when demanded by the partners, as per the agreement entered between the partners/family members and the firm, is contrary to the established accounting principles in vogue.
2. According to the AO, gold belonging to the partners/family members got mixed up with the stock-in-trade and was available for sale along with other stock. In this regard, the AO referred to the statement made u/s 131 of the Act, by the partners of the Assessee Mr. Rajesh B. Chand and Mr. Vivek B. Chand as well the family member Mrs. Pratibha Chandrasekhar recorded in the business premises of the assessee-firm, on 27.12.2012. In the statement so recorded, they accepted that they could not identify the gold/jewellery items brought in by them into the business and categorically agreed in their sworn depositions u/s 131 dated 27.12.2012 that the gold brought into business by them has been converted into stock-in-trade of the assessee-firm and was available for sale. Following extract from the sworn statement of Mr. Vivek B. Chand, Partner brings out the point at hand:

> "Q. No. 7. In response to above question you have mentioned that gold of 7,1 77.40 gms net belonging to you is lying in this business premises. Can you identify jewellery belonging to you kept in the business premises weight
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> Ans. I can not identify the specific jewellery belonging to me. But, out of the entire stock of jewellery available in this business premises, my jewellery is also a part.

Q.No.8 In response to above question, you have stated that the jewellery belonging to yourself forms part of the stock of jewellery available in this premises. Please explain. Whether your jewellery is also available for sale.

Ans. I have deposited my jewellery of 7177.40 gms several years before in the business and it is available for sale along with other jewellery items available in the premises.

Q.No.9. Can you please elaborate on your above response.

Ans. I am only concerned with the gross/net weight of the gold ornaments handed over to the business. After it is handed over, it formed part of the business stock and the same is available for sale. In fact the original items of jewellery deposited by me in the business might have been sold long back. As per the agreement/ contract entered by me with the firm, M/s Rajarathnam's Jewels, it is the liability of the firm to return the gross/net weight of the jewellery deposited by me, as and when 1 want.

3. According to the AO from the above statement it was clear that gold of 16.306kg brought into the business by the partners/family members has been converted into the stock-in-trade of the business. It is nothing but transfer of gold/jewellery by the family members to the assessee-firm and hence, suitable entries should have been made in the books of account of the assessee-firm. Thus, it is clear that the jewellery deposited by the partners/family members got merged into the stock of the business and the same were being recycled for its business. The assessee-firm by not including the jewellery taken from the partners/family members in arriving at opening/closing stock has intentionally suppressed the actual profits of the business, as the value of the gold increased towards the end of the year.
4. The AO thereafter observed that in all trading cases, the true profits cannot be deduced from any system of maintaining

accounts, whether cash or mercantile; unless the opening and closing stocks are brought into picture at cost of market price whichever is lower. Income-tax is an annual levy and the profits of each year require to be ascertained for that purpose as accurately as circumstances permit. If, therefore, in any system of accounting maintained by the assessee, otherwise acceptable, certain stocks (in this case gold deposited by partners/family members) are left out of account, the provisions of section 145(3) necessarily have to be invoked even if it were for the sole purpose of adjusting the book figures for stock figures. In this regard, the AO referred to the decision of the Hon'ble Supreme Court in the case of Commissioner of Income-tax, Madras vs. A. Krishnaswami Mudaliar & Ors, reported in 53 ITR 122 observed as under:

> "Income-tax Act makes no provision with regard to the valuation of stock. It charges for payment of tax on the income, profits and gains which have to be computed in the manner provided by the Income-tax Act permitting allowances prescribed thereby. For that purpose it is the duty of the Income-tax Officer to find out what profits the business has made according to true accountancy practice, in the light of the system adopted, and thereafter to make the requisite adjustments and even appropriate modification of the rule.. .

5. The AO held that as per Accounting Standard AS-2 issued by the Institute of Chartered Accountants of India it is mandatory for every business concern to determine the profit/loss of its business. The importance of valuation of the closing stock is specified in the Objective of AS-2. Without arriving at the correct value of the closing stock, the profit/loss determined will not be proper. As the business houses were adopting different yard stick to arrive at the value of the stock, the institute came out with a guideline/uniform policy to be followed by every person engaged in business. The assessee has computed the profit without taking in to account the value of entire stock available and used in the assessee's business; which is not correct.
6. With regard to the argument of the Assessee that deposit of gold by the partners/family members of the partners was a business arrangement and that such jewellery cannot be considered as firm's stock, the AO held that such arrangement for paying user charges is purely an arrangement between the assessee-firm and the

depositors. This has no relevance, what so ever, for determination of income, profits and gains of the business of the assessee-firm;

7. With regard to the argument that the assessee-firm has only limited right of possession and that such gold being not an asset of the firm did not find a place in the balance sheet of the firm, the AO held that the Assessee in the course of assessment proceedings for AY 2006-07 to 2013-14 filed re-drafted balance sheet and bringing the value of gold deposited into business into the balance sheet; the assessee itself has negated its stand as above.
8. The AO also held that the fat that the gold deposited has to be returned to the partners/family members as and when they demand will not have any effect on the application of accounting principles to be followed by the assessee. He held that the assessee cannot take a stand that that for the purpose of its business the gold deposited is part of the stock; and that it has to be excluded when it comes to valuation of opening/closing stock to arrive at the actual profit of the business (alleging that the firm is not the owner of the stock). He rejected the argument of the Assessee and held that the increase in value of the stock from the previous year to the current has to be treated as the income chargeable to tax in the assessee firm's hand and brought to tax.
9. The AO also referred to a decision of the jurisdictional Karnataka High Court in the case of CIT V. Rajatha Jewellers reported in 286 ITR 0573 (2006) wherein 18.621 kgs of Gold was brought into the firm doing jewellery business by a partner. While filling the returns of the firm, the said gold was not included either in the capital account or as a stock of the firm. The revenue authorities added the same in the assessment after reopening the assessment as the same was not considered in assessment for relevant assessment year. One of the substantial questions of law referred by the Tribunal for adjudication of Karnataka High Court was as under:

> "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the value of 18.621 kgs of gold, brought by K.V. Jayaprakash into the firm, did not constitute stock-in-trade of the assessee firm"

The Hon'ble Karnataka High Court, answered the above question of law in negative and in favour of the Department, and held as under:

"Therefore, from these undisputed facts it is clear that the said value of the stock was not taken into consideration for the purpose of assessing and on that basis no income-tax was paid by the firm. It has escaped assessment. Hence, the case of revenue that it has escaped assessment is clearly established. The tribunal was in total error in ignoring these facts and recording a finding contrary to the material on record. Therefore, the finding recorded by the Tribunal on merits also cannot be sustained."

10. The AO also held that the books of accounts of the Assessee are not complete and correct, not in accordance with the accepted accounting standards and hence liable to be rejected u/s.145(3) of the Act, He proceeded to make an estimation, and held that as per the re-drafted Balance sheet filed by the Assessee, the value of the gold belonging to the family members which was shown at Rs.2,84,89,097/- as on 31.03.2013, was added to the value of closing stock of the firm. He also observed that the stock was being used over a period of time and replaced with new stock as and when the existing stock is sold, with new stock of gold replaced at an enhanced value due to increase in market rate. The appreciation in the value of stock used and remains in the business of the assessee at the end of the year 31.03.2013 will be treated as profit of business. Accordingly, the difference in the closing stock value admitted by the assessee in the re-drafted Balance sheet and the value of the stock arrived by the assessee (Rs.2,84,89,097/- minus Rs.2,37,13,466/-) at Rs. 47,75,631/- is the profit on account of increase in value of closing stock over the opening stock computed by the assessee itself hence treated as income chargeable to tax of the assessee for the Assessment Year 2013-14. The additional income brought to tax is over and above the income already admitted in the original return. The AO accordingly determined the total income of the Assessee as follows:

Total Income as per return	Rs. 89,52,170/-
Add: Additions as discussed above	Rs. 47,75,631/-
Assessed Income	Rs. 1,37,27,800/-

17. Aggrieved by the order of the AO, the Assessee filed appeal before the first appellate authority, CIT(A). Before CIT(A), the assessee contended that pursuant to the Second Survey conducted on 25.09.2012, assessment for Assessment Years 2006-07 to 2012-13 was reopened under section 148 of the Act and additions were made to the total income by valuing closing stock as on the last date of the relevant previous years including the value of family gold, as was made in Assessment Year 2013-14. The Income Tax Appellate Tribunal (ITAT) in ITA Nos.1344 to 1350/Bang/2017 for Assessment Years 2006-07 to 2012-13, by order dated 18.02.2021 held that reopening of assessment under section 148 of the Act was not valid and quashed the said assessments. It was contended that the Tribunal in the said order has upheld the plea of the assessee regarding family jewellery lying in the firm. Therefore, the Order of Assessment for Assessment Year 2013-14 making identical addition should be cancelled by following the order of the Tribunal. The other contentions as put forth before the AO was also reiterated. According to CIT(A), there was delay in filing appeal by the assessee before CIT(A). The CIT(A) refused to condone delay. The CIT(A), however upheld the order of the AO. The CIT(A) held that the decision of ITAT for AY 2006-07 that the ITAT did not consider the merits of the case and only quashed the assessments for the respective assessment years on the legal issue of validity of initiation of reassessment proceedings. He referred to the relevant Para nos. 16 & 17 of the Hon'ble Bangalore ITAT's order in 1TA Nos. 1344 to 1350/Bang/2017 AYrs 2006-07 to 2012-13 dated 18-02-2021 which read as under:-

"16. In view of the foregoing discussions, we hold that the reopening of assessment of all the years under consideration is on account of "change of opinion" and hence the reopening is not valid'. Accordingly we quash the orders passed by the tax authorities for all the years under consideration.

17. In its written submission, the Ld A.R has prayed for adjudicating the grounds on merits also. First of all, we have heard the parties only on the legal issue and not on merits. Hence we are unable to accede to the said request of Ld A.R. Secondly**. We have held in the earlier paragraphs that the reopening of assessment of all the years under consideration is not valid and hence the impugned assessment orders would fail. Hence there is no necessity to adjudicate the grounds urged on merits."**

(emphasis supplied)

The CIT(A) held that the AO has discussed facts and reasons for making the addition of Rs. 47,75.631/- at length and the Assessee failed to controvert the AO's findings while making the addition of Rs. 47,57,631/-. The CIT(A) therefore upheld the addition of Rs. 47,57,631- made by the AO.

18. Aggrieved by the order of the CIT(A), the assessee is in appeal before the Tribunal.

19. As far as the findings of the CIT(A) that there was a delay in filing appeal by the assessee before CIT(A), the said finding is not correct. Appeal against Order of Assessment has to be filed on or before 30 days of receipt of the order by the assessee. The assessee received Order of Assessment on

24.03.2016. An appeal had been filed by the assessee in physical form on 22.04.2016 within the period of limitation. Rule 45 of the Income Tax Rules, 1963, was substituted w.e.f. 01.03.2016 whereby assessee was required to file appeal against Order of Assessment in Form No.33 electronically under digital signature. However, the Department portal was not ready for receiving appeals filed electronically. The office of CIT(A) sent a defect notice dated 06.09.2017 to the assessee pointing out that appeal filed by the assessee on 22.04.2016 has to be filed electronically. On receipt of the letter dated 06.09.2017, the assessee filed appeal electronically on 15.09.2017. The CBDT in Circular No.20/2016 dated 26.05.2016 has acknowledged the fact that its portal for e-filing of appeals was not ready due to technical issues. Therefore, it cannot be said that the assessee filed appeal belatedly. The assessee had filed appeal in time as contemplated by the Act. The failure to comply with the Rule requiring failure to file appeal in electronic mode was therefore owing to reasonable cause and hence the CIT(A) was not justified in holding that the appeal of the assessee was barred by time and hence on this ground, the appeal of the assessee could not be dismissed by the CIT(A) by ignoring facts that were brought to his notice by the assessee in a letter dated 16.09.2017 regarding condonation of delay in filing appeal.

20. In so far as the merits of the appeal is concerned, there are two aspects which need to be first noticed viz., (i) the law is well settled that true profit of business for an accounting period cannot be ascertained without taking into account the value of the stock in trade remaining at the end of the period and that such valuation is a necessary element in the process of determining the trade result of the period. The Hon'ble Supreme Court in the

case of M/s. Sanjeev Woolen Mills vs Commissioner of Income-Tax, Appeal (civil) 6735-6736 of 2003 judgment dated 24.11.2005 has summed up the law, as stated above, after reviewing several decisions on the point. Therefore, if the stock of the family is regarded as the stock of the firm, then to that extent, the value of closing stock has to be enhanced; (ii) The partners' family gold can be regarded as firm's gold only when the same was treated as the asset of the firm. Therefore, if the family gold is regarded as capital contribution or asset of the firm then the action of the Revenue in the present case would be justified.

21. The crux of the submission of the learned counsel for the Assessee was that two fold viz., the acceptance of the plea of the Assessee in the first survey and reliance on the instrument of deposit of jewellery whereby the jewellery was only kept in trust with the Assessee and the Assessee was not it's true owner. The learned DR took us through each of the findings of the AO and submitted that those findings clearly support the conclusions of the revenue authorities that the jewellery in question belonged to the firm and had to be considered as stock in trade of the Assessee for correctly computing the profits of the business of the Assessee.

22. We have carefully considered the rival submissions. The decision of the Tribunal for AY 2006-07 to 2012-13 was decided not on the merits of the addition made in those years, which is identical to the addition made in AY 2013-14 which is the subject matter of the present appeal. The initiation of reassessment proceedings u/s.147 of the Act in AY 2006-07 to 2012-13 was held to be not valid. For initiating proceedings u/s.147 of the Act, the AO should have reason to believe on the basis of material coming into his

possession after conclusion of the original assessment, that income chargeable to tax has escaped assessment. The fact that the partner's/family jewellery was with the firm was already in the knowledge of the department consequent to the first survey and therefore the same fact which emanated from the second survey, cannot be the basis to entertain belief regarding escapement of income and therefore initiation of reassessment proceedings u/s.147 of the Act were held to be bad in law. The tribunal specially observed that the merits of the addition are not being gone into. Therefore the order of the tribunal was rightly held by the CIT(A) to be not relevant for AY 2013-14 which is an assessment u/s.143(3) of the Act made for the first time by the AO.

23. In so far as the merits of the addition made by the AO is concerned, we find that the law is well that true profit of business for an accounting period cannot be ascertained without taking into account the value of the stock in trade remaining at the end of the period and that such valuation is a necessary element in the process of determining the trade result of the period. The Hon'ble Supreme Court in the case of M/S. Sanjeev Woolen Mills vs Commissioner Of Income-Tax, Appeal (civil) 6735-6736 of 2003 Judgment dated 24.11.2005 has summed up the law, as stated above, after reviewing several decisions on the point.

24. The next aspect that needs to be addressed is the question whether the stock of 16.306 Kgs. of gold can be said to be the stock of the firm or of the individual partners/family members. The jewellery belonged to 2 partners and 2 other family members of the partners of the firm. In so far as the jewelery belonging to the partners is concerned, the AO also made out a case

that the partners treated the jewellery as the jewellery of the firm. In this regard, the law is laid down in Sec.14 of the Indian Partnership Act, 1932, which provides, as follows:

> **"**Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of business of the firm, and includes also the goodwill of the business. Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm."

Partnership can acquires property by purchase or otherwise. Hence, a partnership property comprises of the following items if there is no agreement between the partners showing any contrary intention:

- All property and rights and interest in property that the partners purchase in the common stock as their contribution to the common business.
- All property and rights and interest in property that the firm purchases either for the firm or for the purpose and in course of the business of the firm.
- Goodwill of the business.

Determining whether a particular property is partnership property depends on the true intention or agreement between the partners. Hence, if a firm uses the property of a partner for its purposes, it does not make it a partnership property unless that was the real intention.

25. According to section 15, the partnership property should be held and used exclusively for the purpose of the firm. While all partners have a community of interest in the property, during the subsistence of the partnership no partner

has a proprietary interest in the assets of the firm. Each partner has a right to his share in the profits of the firm until the firm subsists. He also has a right to see that the application and use of the assets of the firm are for the purpose of the business of the partnership. Lindley on "The Law of Partnership", 14th Edition at page 444 states as under:

> "The expressions partnership property, partnership stock, partnership assets, joint stock, and joint estate, are used indiscriminately to denote everything to which the firm, or in the other words all the partners composing it, can be considered to be entitled as such. The qualification "as such" is important; for persons may be entitled jointly or in common to property, and the same persons may be partners, and yet that property may not be partnership property; e.g. if several persons are partners in trade, and land is devised or a legacy is bequeathed to them jointly or in common, it will not necessarily become partnership property and form part of the common stock in which they are interested as partners. Whether it does so or does not, depends upon circumstances which will be examined hereafter."

At page 445 it is stated,

> "it is competent for partners by agreement amongst themselves to convert what is the joint property of all into the separate property of some one or more of them and, vice versa. It is also stated that whatever at the commencement of a partnership is thrown into the common stock and whatever has from time to time during the continuance of the partnership been added thereto or obtained by means thereof can be treated as partnership property.

At page 457 it is stated,

> "It is competent for partners by agreement amongst themselves to convert that which was partnership property into the separate property of an individual, or vice versa. And the nature of the property may be thus altered by any agreement to that effect; for neither a deed nor (save where the property consists of land) even writing is absolutely necessary. **Thus where an asset the title to**

> **which is vested solely in one partner is shown in the balance-sheet as an asset of the partnership, this would be evidence to show an agreement to treat that asset as partnership property.** However, so long as an agreement is dependent upon the unperformed condition, the ownership of the property will remain unchanged."

Halsbury's "Laws of India" (Volume 4) at page 214 states,

> "the property of the firm, subject to contract between the partners, includes all property and rights and interests in the property originally brought into the stock of the firm, or acquired by purchase or otherwise, by or for the firm or for the purpose and in the course of the business of the firm and includes also the goodwill of the business. **Partners may convert that which was partnership property into the separate property of an individual partner or vice versa by agreement, express or implied".**

S.T.Desai's "The Law of Partnership in India" (7th Edition)at page 123 states,

> "that the expression property of the firm also referred to as partnership property, partnership assets, joint stock, common stock or joint estate denotes all property rights and interests to which the firm, i.e. all the partners as such, may be said to be entitled and that **Section 14 furnishes a useful guide in determining and what is and what is not property of the firm but, the question must ultimately depend on the real intention and agreement of the partners**".

At page 124 the Author states,

> "the general rule stated in the Section (Section 14) is applicable subject to contract between the partners. **It is open to the partners to agree themselves as to what is to be treated as the property of the firm and what is to be the separate property of one or more of the partners.**Such an agreement need not be express but may be implied from the facts and circumstances of the case".

At page 125 it is stated,

> "**the whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever is brought in would cease to be the exclusive property of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest".**

26. In the light of the law as explained above, if we examine the facts of the present case, the agreement between the firm and the partners provides that the jewellery given by the partner can be used by the firm and sold by the firm and the partner will get only equivalent quantity of metal, if the jewellery is not traceable in specie. It also says that the jewellery will be held in trust by the firm. Therefore there appears to be a contradiction in terms of ownership of the jewellery. It is not possible for the firm on the one hand to exercise its right to sell the jewellery and on the other hand to hold the jewellery in trust. One cannot have the cake and eat it too. The intention therefore appears to be clear that the jewellery was brought into the firm as contribution by the partners and the firm has ownership over the jewellery. This fact is also further corroborated by the firm showing the jewellery as its asset in the revised Balance sheet filed by the Assessee showing the jewellery as asset of the firm. The course of conduct of the partners and the firm has been in vogue for a fairly long period of time. In the given circumstances, the revenue authorities were justified in treating the jewellery as that of the firm and including the same as part of the stock in trade of the firm. This could be the only conclusion that can be arrived at on an analysis of the circumstances and intention of the parties as evidenced from the agreement for usage of jewellery between the firm and the partner and the course of conduct of the parties. The AO has analyzed the facts

thoroughly and has rightly come to the conclusion that the stock claimed as belonging to the partners/family members of partners, is in fact the stock of the firm. Each one of the findings of the AO in our view is proper and based on the circumstances and course of conduct of the parties. The fact that in the first survey the plea of the Assessee was accepted and the same yardstick should apply to the assessment framed after the second survey was rightly rejected by the AO by pointing out the circumstance of the Assessee having filed a revised balance sheet showing the jewellery as asset of the firm. The statement recorded in the course of the second survey of the partners also confirms the fact that the gold jewellery in question were treated as asset of the firm. We also agree with the conclusion of the AO that when the stock of the partner/family member of partner can be sold by the Assessee and when the Assessee is duty bound only to return the quantity of gold in specie and not the actual jewellery deposited, there was a conversion of the partner's asset as the asset of the firm. The recital in the deed of deposit that the jewellery has to be kept in trust by the firm cannot go together with the right of the firm to sell the jewellery. The arrangement between the firm and the depositors in this regard was rightly regarded as an act by which the partners treated the jewellery as that of the firm.

27. In so far as the jewellery deposited by the family members of the partners are concerned, the findings applicable to the partners will equally apply to the deposit of jewellery by the family members also, with the only difference being that the course of conduct of the parties can lead to only conclusion that the firm treated their jewellery also as that of the firm. The facts of the case and the instrument of deposit of jewellery, clearly shows that the agreement between the firm and the family members of the partners

was to give their jewellery for use by the firm. The firm has a right to sell it. The depositor will get only equivalent quantity of metal, if the jewellery is not traceable in specie. It also says that the jewellery will be held in trust by the firm. The intention therefore appears to be clear that the jewellery was treated as belonging to the firm. The firm had ownership over the jewellery. The firm reflected these items of jewellery as its asset in the revised Balance sheet filed by the Assessee showing the jewellery as asset of the firm. The course of conduct of the parties coupled with the fact that practice has been in vogue for a fairly long period of time, can only lead to one conclusion that these items of jewellery were also regarded as that of the firm. In the given circumstances, the revenue authorities were justified in treating the jewellery as that of the firm and including the same as part of the stock in trade of the firm. This could be the only conclusion that can be arrived at on an analysis of the circumstances and intention of the parties as evidenced from the agreement for usage of jewellery between the firm and the family members of the partner and the course of conduct of the parties. We therefore uphold the stand taken by the revenue and find no merit in the plea put forth by the Assessee.

28. In the result, appeal by the Assessee is dismissed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(N.V.VASUDEVAN)	**(LAXMI PRASAD SAHU)**
Vice-President	**Accountant Member**

Bangalore,
Dated: 28.10.2022.
/Shoba/*

Copy to:

1.	Appellants	2.	Respondent
3.	CIT	4.	CIT(A)
5.	DR	6.	Guard file

By order

Assistant Registrar,
ITAT, Bangalore.