

आयकर अपीलीय अधिकरण “एफ” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH, MUMBAI

सुश्री सुषमा चावला ,न्यायिक सदस्य एवं श्री एन.के. बिलैय्या, लेखा सदस्य के समक्ष ।

Before Ms. Sushma Chowla, JM and Shri N.K. Billaiya, AM

आयकर अपील सं./ **ITA Nos. 7328 & 7329/Mum/2013**

(निर्धारण वर्ष / Assessment Years: 2009-10 & 2010-11)

A C I T - 16(3)

Room No. 206, 2nd Floor

Matru Mandir, Tardeo Road

Mumbai 400007

बनाम/

Vs.

M/s. Venus Jewel

EC-5021/22, Bharat Diamond

Bourse, Bandra-Kurla Complex

Bandra, Mumbai 400051

स्थायी लेखा सं./PAN : AAAFV0888R

(अपीलार्थी / **Appellant**)

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(प्रत्यर्थी / **Respondent**)

प्रत्याक्षेप सं./ CO No. 37/Mum/2015

(in ITA No. 7329/Mum/2013)

(निर्धारण वर्ष / Assessment Year: 2010-11)

M/s. Venus Jewel

EC-5021/22, Bharat Diamond

Bourse, Bandra-Kurla Complex

Bandra, Mumbai 400051

बनाम/

Vs.

A C I T - 16(3)

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स्थायी लेखा सं./PAN : AAAFV0888R

(**Cross Objector**)

..

(**Appellant in Appeal**)

राजस्व की ओर से / Revenue by :

Shri G.M. Doss

निर्धारिती की ओर से/ Assessee by :

Shri K. Shivaram &
Shri Rahul R. Sarda

सुनवाई की तारीख /Date of Hearing : 30.07.2015

घोषणा की तारीख/Date of Pronouncement : 31.07.2015

आदेश/ORDER

PER Sushma Chowla, J.M.

These two appeals filed by the Revenue are against the consolidated order of the CIT(A) dated 16.09.2013 relating to assessment years 2009-10 and 2010-11 against the order passed under section 143(3) of the Act. The

assessee has filed cross objections against the appeal filed by the Revenue relating to assessment year 2010-11 against the order passed under section 143(3) of the Act. Both the appeals filed by the Revenue relating to the same assessee and the cross objections filed by the assessee on similar issues were heard together and are disposed of by this consolidated order for the sake of convenience.

2. The issue raised by the Revenue in both the appeals relating to assessment years 2009-10 and 2010-11 are identical and the grounds of appeal in ITA 7328/Mum/2013 read as under: -

- “1. Whether on the facts and circumstances and in law, the Ld. CIT(A) has erred in holding that ‘Mark to Market’ loss of Rs.66,51,21,162/- arising on valuation of forward exchange contracts on the closing date of accounting year is not a notional loss and, therefore allowable?”*
- 2. Whether on the facts and circumstances and in law, the Ld. CIT(A) was right in not taking cognizance of the decision of the ITAT, ‘E’ Bench, Mumbai in ITA No. 506/Mum/2013 dated 03.05.2013 in the case of M/s. S. Vindokumar Diamonds Pvt. Ltd.?”*
- 3. The Ld CIT (Appeal) grossly erred on facts in not confirming disallowance of mark to market loss of Rs.66,51,21,162/- on account of outstanding forward contracts.”*

3. The learned A.R. for the assessee at the outset pointed out that the issue in the present appeal is squarely covered by various orders of the Mumbai Tribunal in favour of the assessee and also by the order of the Apex Court in the case of CIT vs. Woodward Governor India Pvt. Ltd. 294 ITR 451 (SC). It is further pointed out by the learned A.R. for the assessee that the CIT(A) had allowed the appeal of the assessee following the said ratio laid down by the Apex Court.

4. The learned D.R. for the Revenue pointed out that the facts of the present case are at variance, i.e. the AO had noted that there were pending contracts which had not concluded and as such the ratio of the earlier decision were not applicable. Another objection raised by the learned D.R. was that contrary view has been taken by the Mumbai Benches of the

Tribunal in the case of M/s. Vinod Kumar Diamonds Pvt. Ltd. in ITA No. 506/Mum/2013 dated 03.05.2013.

5. The learned A.R. for the assessee, in rejoinder, pointed out that the assessee has consistently offered profit from foreign exchange differences in the earlier and later years to tax. Our attention was drawn to the order of the CIT(A) at page 26 and it was pointed out that only in the year under consideration there was loss on account of foreign exchange fluctuations whereas in each of the year there was foreign exchange gains. Another distinction drawn was that the Tribunal in M/s. S. Vinod Kumar Diamonds Pvt. Ltd. (supra) had addressed the issue whether the loss on foreign exchange fluctuations was speculation loss or business loss and the issue was not regarding allowability of mark to market loss. It was further pointed out that the Tribunal had also not considered the decision of the Apex Court in the case of Woodward Governor India Pvt. Ltd. (supra).

6. We have heard the rival submissions and carefully perused the record. Briefly, in the facts of the present case the assessee was engaged in the business of import and export of diamonds. The assessee had entered into forward exchange contracts, which were revalued by it on the closing day of the accounting year. On such revaluation the assessee had claimed mark to market loss on the said forward exchange contracts amounting to ₹66,51,21,162/-. The AO was of the view that the contract had not been settled and the loss being notional, the same was not allowable in the hands of the assessee. The explanation of the assessee was that it was engaged in the business of import of rough diamonds and thereafter cutting and polishing the same and exporting the polished diamonds. Since the assessee had a very substantial bank finance in foreign currency, which in turn was required to settle only in foreign currency. In order to save it from exposure on account of foreign exchange rates it had entered into forward contract to hedge against the risk of fluctuations in foreign currency rates. The said transaction of entering into forward contracts was claimed by the assessee to be an integral part and incidental to export business undertaken by the assessee. The said contracts for purchase and sale of foreign currency were

monitored under various regulations issued by the RBI and assessee was permitted to enter into forward exchange contracts because of its export activity. Assessee was revaluing all the monetary assets and liabilities outstanding at the end of the year following AS-11 and recognizing the profit/loss during the year. It may be noted that for the year under consideration the assessee had booked loss on account of forward contract in foreign exchange. However, both in the preceding years and in the succeeding years assessee had gain on such forward contracts which was assessed as business income in the hands of the assessee. The AO rejected the claim of the assessee because it has entered into mark to market loss on forward exchange contracts and disallowed a sum of ₹66,51,21,162/-. The AO disallowed the claim of the assessee as the same had not been settled at the year end and hence the losses were not actual losses.

7. The CIT(A) examined the material on record and observed that the assessee was exposed to the risk arising in fluctuation out of exchange rate and as a prudent business man it would like to hedge its risk. Accordingly, the assessee had booked the forward contracts and utilised the same during the year or in the succeeding years. The CIT(A) noted that the pattern of the assessee reflected that it entered into forward contracts during the normal course of business and utilised the same for business allowing them to run upto the date of contract. The assessee was engaged in the export of diamonds and the forwards contract was entered into in respect of foreign exchange to be received as a result of export and the same was done to avoid the risk of loss due to foreign exchange fluctuations. After taking note of the claim of forward contracts and the accounting policies, i.e. AS-11 (revised) and applying the ratio laid down by the Apex Court in the case of *Woodward Governor India Pvt. Ltd.* (supra) the claim of the assessee was allowed by the CIT(A), against which the Revenue is in appeal.

8. We find that the issue arising in the present appeal, i.e. loss on account of forward contract entered into by the assessee to hedge against the loss arising on account of fluctuations in foreign exchange arose before

the Tribunal in a series of cases. The learned A.R. for the assessee placed reliance upon the following decisions of different Benches:

- i) ACIT vs. M/s. Monarch Gems - ITA No. 2613/Mum/2013 dated 09.07.2014
- ii) ACIT vs. M/s. Vimal Export - ITA No. 6610/Mum/2012 dated 08.01.2014
- iii) ACIT vs. M/s. Rupam Impex - ITA No. 4008/Mum/2012
- iv) ACIT vs. M/s. H. Dipak & Co. - ITA No. 7629/Mum/2011 dated 30.04.2013
- v) The Paper Products Ltd. vs. Addl. CIT - ITA No. 7761/Mum/2012 dated 28.03.2014
- vi) ECL Finance Ltd. vs. The DCIT - ITA No. 6612/Mum/2011 dated 30.01.2013
- vii) Reliance Communications Ltd. vs. CIT - ITA No. 671/Mum/2013 dated 12.02.2014
- viii) DCIT vs. M/s. Laguna Clothing Pvt. Ltd. - ITA No. 6129/Mum/2012 dated 04.12.2013

9. The Tribunal, in M/s. H. Dipak & Co. - ITA No. 7629/Mum/2011 relating to assessment year 2008-09, vide order dated 30.04.2013 observed as under: -

“8. In the case of Banque Indosuez (supra) cited by the ld. counsel for the assessee, the co-ordinate Bench of this Tribunal had an occasion to consider a similar issue and the same was decided by the Tribunal in favour of the assessee following the decision of Special Bench of ITAT in the case of Bank of Bahrain & Kuwait (supra) as is evident from para 15 of the order of the Tribunal passed in the said case which is reproduced hereunder:-

“After considering the rival submissions and perusing the relevant material on record we find that the assessee entered into forward foreign exchange contract during the year. In respect of the unmatured contracts as at the year end, the assessee valued such unmatured forward foreign exchange contracts at the rate of exchange prevailing as at the end of the year which resulted into loss of Rs. 7.14 crore. It can be considered by way of simple example. If the assessee undertakes a forward foreign exchange contract as on 18th January, 1998, on which the rate of dollar is Rs. 42. Further suppose that the contract is to mature on 30th April at the price of Rs. 46 per dollar. Suppose at the end of the

year 31st March, the rate of dollar has gone up to Rs. 43, the assessee's claim is that the difference of Rs. 1 (Rs. 43 -42) as on 31st March, 1998 should be taken as loss and allowed deduction accordingly. The Special Bench of the Tribunal in the case of Dv. CIT (International Taxation) v. Bank of Bah rain & Kuwait [2010] 41 SOT 290 (Mum.) has held that the loss incurred by the assessee on account of evaluation of the contract on the last day of the accounting year i.e. before the date of maturity of the forward contract, is allowable as deduction. In that view of the matter this loss of Rs. 7.14 crore representing difference of Re. 1 (Rs. 43 - 42) is liable to be allowed as deduction”.

9. *In the latest decision rendered on 9th January, 2013 in the case of Societe Generale (supra) cited by the ld. counsel for the assessee, the coordinate Bench of this Tribunal has again allowed a similar claim of the assessee for the loss of Rs. 9.16 crores on foreign exchange contracts outstanding as on 31-3-1998 holding that this issue is squarely covered in favour of the assessee by the decision of the Special Bench of ITAT in the case of Bank of Bahrain & Kuwait (supra). In our opinion, the issue involved in the present case thus is squarely covered in favour of the assessee by various judicial pronouncements discussed above and respectfully following the same, we uphold the impugned order of the ld. CIT(A) allowing the claim of the assessee on account of “marked to market” loss on revaluation of the pending forward contract for foreign exchange.”*

10. The issue arising in the present appeal before us is identical to the issue before the Tribunal and also in view of the ratio laid down by the Hon'ble Supreme Court in the case of CIT vs. Woodward Governor India Pvt. Ltd. (supra) which squarely covers the issue in favour of the assessee, we uphold the order of the CIT(A) in deleting the addition made on account of disallowance of the loss incurred on forward contract in foreign exchange. The grounds of appeal raised by the Revenue are thus dismissed.

11. The learned D.R. for the Revenue had placed reliance on M/s. Vinod Kumar Diamonds Pvt. Ltd. (supra). The said decision is contrary to the view taken in Badridas Gauridu P. Ltd. 261 ITR 256 (Bom). We find no merit in the said reliance. Allowing the claim of the assessee, we dismiss the grounds of appeal raised by the Revenue.

12. The issue in ITA No. 7329/Mum/2013 is identical to the issue in ITA No. 7328/Mum/2013 and our decision in ITA No. 7328/Mum/2013 applies mutatis mutants to the issue in ITA No. 7329/Mum/2013.

13. Now coming to the cross objections filed by the assessee, the learned A.R. for the assessee submitted that the same may be dismissed. In view of our dismissing the appeals of the Revenue the cross objections raised by the assessee do not survive and the same are dismissed.

14. In the result, the appeals of the Revenue as well as the cross objections of the assessee are dismissed.

परिणामतः राजस्व की अपीलें/निर्धारिती की प्रत्याक्षेप खारिज की जाती है।

Order pronounced in the open court on 31st July, 2015.

आदेश की घोषणा खुले न्यायालय में दिनांक: 31.07.2015 को की गई।

Sd/-

(N.K. Billaiya)

लेखा सदस्य/**Accountant Member**

Sd/-

(Sushma Chowla)

न्यायिक सदस्य/**Judicial Member**

मुंबई Mumbai; दिनांक Dated: 31st July, 2015

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)- 27
4. आयकर आयुक्त / CIT - 16
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, "F" Bench, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

सत्यापित प्रति //True Copy//

सहायक पंजीकार / Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई/ITAT, Mumbai

n.p.