

Assistant Commissioner of Vs. B. N. Rathi Securities Ltd.

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Court : Income Tax Appellate Tribunal ITAT Hyderabad

Decided On : Nov-12-1998

Judge : O Narayanan, S A Reddy

Appellant : Assistant Commissioner of

Respondent : B. N. Rathi Securities Ltd.

Judgement :

1. These three appeals are filed by the Revenue for the asst. yrs.

1988-89, 1989-90 and 1990-91. The common appellate order passed by the CIT(A), Andhra Pradesh, Hyderabad is assailed by the Revenue in these appeals. The respondent-assessee is a company engaged in the business of hire-purchase and leasing.

2. There is a delay of 12 days in filing these appeals. The Revenue has filed petitions to condone the delay. It is stated that the delay has been caused due to oversight in petitioner's office and he was also attending to survey, search and seizure operations. Heard on the matter. During the relevant time, the petitioner was also busy with equally important public duties such as the field operations of the Department. The delay was not wilful or due to negligence. The period of delay is also short. The delay has been reasonably explained.

Therefore, we condone the delay. The appeals are admitted.

3. The Revenue has raised such contentions in its grounds of appeals that the CIT(A) has erred in allowing the claims of the assessee : (i) to deduct the diminution in the value of the shares held on the balance sheet date; (ii) to delete the appreciation in the value of shares held on the balance sheet date; (iii) to claim depreciation on the various assets held for hire purchase business; (v) to delete the addition of the add-back of depreciation adjusted in s. 143(1)(a) of the Act.

4. These appeals are clubbed together for joint hearing and analogous disposal by this common order. The issues involved in these appeals are considered and decided with reference to each assessment year in appeal.

1. The first ground of appeal is that the CIT(A) has erred in allowing the difference/fall in market value of shares of Rs. 2,73,550 on 31st December, 1987.

2. The assessee was holding shares for Rs. 7,08,000 as on 31st December, 1986 at cost price. During the previous year under appeal, the assessee further invested in shares for Rs. 2,61,000. On the close of the previous year as on 31st December, 1987, the total investment in shares was Rs. 9,69,000 at cost. The total of the market value of those shares on that date was Rs. 6,95,450. The assessee contended that the shares are held as stock-in-trade and therefore entitled to value the shares at cost or market price whichever is less and to claim the valuation loss if any, as deduction in the computation of income. On this ground, the assessee claimed as deduction, Rs. 2,73,550 being the share valuation loss.

3. The AO did not allow the deduction as according to him the assessee was holding the shares as investments and not as stock-in-trade, and the profit or loss could be considered only at the time of sale of the shares. The AO has also pointed out that the assessee has not furnished necessary evidences to establish the purchase of shares, cost of purchase of shares etc. The AO disallowed the claim on the above grounds after discussing the issue at length in nine pages of his assessment order.

4. In first appeal, the CIT(A) accepted the contention of the assessee on the basis of a finding as follows : "I have looked into documentary evidence. By objects and

the conduct, the appellant is a business concern and the difference should have been allowed." 5. We heard Shri C. P. Ramaswamy, the Senior Departmental Representative and Shri G. Kalyandas, C.A. at length and perused the rival contentions in the light of the records of the case, paper-books submitted and case-laws cited. Shri Ramaswamy, the learned Senior Departmental Representative argued that the assessee has neither established that it was holding the shares and securities as stock-in-trade nor proved the purchase itself with the details of cost, etc. The learned Chartered Accountant for the assessee contended that necessary evidences have been furnished in respect of the purchase and cost of the shares; that the shares have been held under current assets as stock-in-trade; that the nature of the asset would not change only because it was classified under the head 'Investment' and that the CIT(A) was right in holding that the assessee has held the shares and securities as a dealer and not as an investor. He relied on the decision rendered by the Andhra Pradesh High Court in State Bank of Hyderabad vs. CIT (1985) 151 ITR 703 (AP).

6. In its balance sheet for the period ending on 31st December, 1987, which is relevant for the asst. yr. 1988-89, the assessee has shown the shares and securities under the head 'Investments' (Schedule No. 5 to balance sheet). In the balance sheets for the subsequent periods ending on 31st March, 1989 and 31st March, 1990, the shares and securities have been shown as "stock-in-trade (shares)" as per Schedule No. 6. As rightly pointed out by the learned C.A., the nomenclature given to the classification of assets in the accounts alone need not determine the true nature of the assets to see whether those assets are held as stock-in-trade or investments or fixed assets, as the case may be. One has to examine the real purpose and intent for which the relevant assets are held. 7. In the present case before us, so as to say, there is no direct evidence to show that the assessee has carried on the business of dealing in shares and securities in addition to its main business of hire purchase and leasing. So the nature of the asset has to be ascertained from the intention of the assessee as gathered from the conduct of the assessee.

8. The assessee is a limited company. It is an artificial juridical person. It has no living mind of its own. Its intention has to be seen from the references and

reflections available in its accounts, reports and resolutions, etc. In the directors report accompanying the annual accounts, they mention only about the "Hire-purchase and Leasing Business" (directors report para-3 Third Annual Report 1988-89). There is no resolution or other evidence to show that the assessee-company has entered into a new line of business of dealing in shares and securities.

9. The investment in shares and securities is shown in the balance sheet at cost. The shares and securities have not been passed through the Trading and P&L a/c, as an item of stock-in-trade. It is true, as rightly contended by the learned C.A. that the stock in trade could be valued at cost or market value whichever is less. But that stock valued at the lesser rate should come through the Trading a/c so that the loss on account of valuation is reflected in the P&L a/c of the assessee. The valuation loss, in this case, has not been reflected in the accounts of the assessee. The assessee, being a company, it cannot have profit or loss outside its books of account.

As the shares have been shown in the balance sheet at cost, the loss on account of fall in price of the shares has not been borne out of the accounts. An item as profit/loss or income/expenditure or capital/revenue may have different import under different contexts with reference to Standard Accounting Practices, Accounting Standards, Companies Act, IT Act, etc. But the basic nature and character of that item, as a matter of fact, should be the same. If the assessee had the intention of treating the shares as stock-in-trade, that intention should have borne out of the accounts and statements of the assessee, which is bound by Sch. VI of the Companies Act in respect of its disclosure liability. It is found that the assessee has treated the shares and securities as investment for the purpose of its accounts, reporting and disclosure purpose under Companies Act. Therefore, the assessee cannot rely on different intention against the basic fact for the purpose of IT Act, so to claim the share valuation loss outside the accounts, as a deduction from the computation of income.

10. We may reproduce item No. 5 of the "Notes on Accounts" in Sch.

13 forming part of balance sheet for the year 1988-89 : "5. The aggregate amount of investment in shares and securities as on 31st March, 1989 was Rs. 3,50,186 and the market value was Rs. 2,57,200. No provision was made in the accounts to cover losses if any in the value of investments." The above observation demonstrates that the assessee had no intention to treat the valuation loss as an actual trading loss. The assessee treats it only as a contingent loss.

11. As examined in paras 7, 8, 9 and 10 above, it is found that the intention of the assessee to treat the shares and securities as stock-in-trade is not evident or clear from its accounts, statements, reports or resolutions.

12. Moreover, the assessee is not a member of any stock exchange or any authorised share-broker. Therefore, the assessee-company cannot carry on any business of dealing in shares and securities. Every purchase of shares and securities, therefore, could be only investments in the hands of the assessee. It may be a short-term or long-term investment, depending on the period of holding, but it cannot be stock-in-trade.

13. The case law referred to by the learned C.A. for the assessee stands on a different footing. In that case, a banking company claimed income arising from securities as business income. The bank was bound by law to investment in securities. The investment in securities is a normal step and usual method of carrying on banking business. As far as a bank is concerned, cash is its stock-in-trade.

Investment in securities is made out of that cash as required by law. Therefore, the Court held that the securities are business stock and therefore income therefrom was business income. In the present case, the assessee, a hire-purchase and leasing company has invested in shares. There is no direct or indirect evidences to show that the company was doing business in the purchase and sale of shares. And there is no evidence to show that the assessee was permitted in law to carry on the business of shares and securities.

In the circumstances, we are afraid that the decisions relied on by the learned C. A. are not applicable to the assessee's case.

14. Accordingly, we find that the assessee held the shares and securities as investments and not as stock-in-trade. Therefore, the assessee is not entitled to claim the diminution in the value of shares and securities as deductible from its income.

15. As already we have come to a definite finding in respect of share valuation loss, we are not examining the contentions regarding the evidences of purchase of shares, cost of purchase, etc.

16. As the assessee was holding the shares and securities as investment, the profit or loss could be ascertained only on the sale of those investments and any diminution in the market value of the investments during the intervening period is only a contingent loss.

Therefore, the AO is right in law to disallow the deduction of Rs. 2,73,550, and the CIT(A) is not justified in allowing the claim.

This point is decided in favour of the Revenue and the direction of the CIT(A) in this regard is set aside.

17. The next ground raised by the Revenue is that the CIT(A) has erred in deleting the interest under s. 217 in respect of tax liability payable under s. 115J. 18. As the income computed by the AO was less than thirty per cent of assessee's book profit, the AO has invoked the provisions of s.

115J and assessed the income at Rs. 1,92,330 being thirty per cent of the book profit. But the tax thereon was short-computed in the assessment order dt. 15th March, 1991. Therefore, the AO rectified the assessment order dt. 15th March, 1991 under s. 154, vide his order dt. 5th June, 1991 to make good the short levy of tax. In the said 154 order, the AO has also levied interest under s. 217 for failure of estimating the advance tax payable by the assessee.

19. The levy of interest was challenged in first appeal. The CIT(A) in his common appellate order considered this appeal also and held that the AO was not justified to levy tax under s. 217.

20. The assessee has raised a preliminary objection in admitting and hearing this ground advanced by the Revenue. Interest has been levied by a separate order passed under s. 154. The assessee has filed separate appeals before the CIT(A) one against the original assessment order under s. 143(3) and the other against rectification order passed under s. 154. The CIT(A) disposed those two appeals by a consolidated order which is impugned in these appeals. According to the assessee, even though the CIT(A) has disposed both the appeals filed by the assessee in a common order by way of consolidation, the Revenue ought to have filed a separate appeal to contest the issue of interest as the interest has been levied by the AO by a separate order under s. 154 different from the assessment order under s. 143(3). The CIT(A) has disposed two appeals in his order-one against assessment and the other against levy of interest.

Now, the Revenue has filed only one appeal which related to the assessment under s. 143(3). It should have filed another appeal before the Tribunal relating to s. 154 order. It has not been filed.

Therefore, the Revenue cannot raise any ground in respect of the levy of interest.

21. Shri Ramaswamy, the learned Departmental Representative has admitted that the Revenue has not filed any separate appeal to contest the issue of interest, but the same has been raised as a separate ground in the appeal. The learned Departmental Representative argued that the Revenue is entitled to raise the ground even in the absence of a separate appeal and placed reliance on *Mani & Co. vs. CIT* (1995) 213 ITR 563 (Ker) and *CIT vs. Hansa Agencies* (1980) 121 ITR 147 (Bom).

22. The preliminary objection raised by the assessee was examined carefully. In the case of *Mani & Co. vs. CIT* (supra) the Hon'ble High Court of Kerala was considering the maintainability of a single reference application against multiple appeals arising out of one order of assessment made on one assessee for one year under one enactment. The Court held that one application was sufficient. The Court further held that separate application was necessary for each case against appeals relating to the same assessee for different years or for the same year but under different enactments. In *Hansa Agencies'* case (supra), the Hon'ble Bombay

High Court was considering a single appeal filed by the assessee before the AAC against two orders passed by the ITO passed on the same day; one order refusing the continuation of registration and the other computing total income. The Court held that one appeal was in order.

23. We find that the decisions cited by the learned senior Departmental Representative support the view of the Revenue.

Substantive right is the right of appeal. Exact filing of an appeal is a matter of procedure. In this case, the assessment order under s. 143(3) is the principal order. The order under s. 154 is only a consequential order arising out of the income assessed in the principal order. The order under s. 143(3) and the order under s.

154 are inter-related that the latter arises only out of the former, that the assessee being the same, that the assessment year being the same, that the first appellate order appealed against is a single and consolidated one; that the issue arises out of the consolidated order and therefore, in the circumstances, we find that the Revenue could contest the issue of interest levied under s. 154 by raising a separate ground in the appeal arising out of the assessment order.

The CIT(A) has consolidated both the appeals filed by the assessee and has disposed those appeals by a common order. Therefore, as far as the Tribunal is concerned, the issue of assessment as well as the issue of interest arises out of a single and consolidated order in which both the orders under s. 143(3) and under s. 154 are merged together. From this point of view also, we find that the Revenue is entitled to raise the issue of levy of interest by way of a distinct ground in the appeal. Filing of a separate appeal may be desirable, but not mandatory. Therefore, we rule out the preliminary objection raised by the assessee and admit the ground raised by the Revenue with reference to the deletion of interest levied under s. 217.

24. Now regarding the merits of the contention on levy of interest under s. 217 with reference to the income assessed under the deeming provision of s. 115J. The levy of interest is under s. 217 is on the amount of assessed tax within the

meaning of s. 215(5). Neither the levy of interest under s. 217 nor the assessed tax under s. 215(5) on which interest is levied provide for any exclusion for the tax, pertaining to the income computed under s. 115J. Neither is there any exception provided in s. 207 which is the charging section for advance tax and in s. 208 wherein the liability is prescribed. As far as the "assessed tax" under s. 215(5) is concerned, there is no distinction between assessed tax relating to the income assessed under normal provision of the Act and the assessed tax relating to the income assessed under deeming provisions like s. 115J etc. Once the income is determined and assessed, it is indivisible into segments unless specified otherwise for purposes of special rates applicable to long-term capital gains, etc. The tax once determined and assessed, it is indivisible.

25. Therefore, the CIT(A) is not justified in deleting the interest levied by the AO under s. 217 only on the ground of s. 115J. 26. For the asst. yr. 1988-89, the Revenue has raised two contentions and they are allowed. Therefore, the appeal for the asst. yr. 1988-89 is to be allowed setting aside the order of the CIT(A).

1. The first ground raised for this year is that ". . . the CIT(A) erred in allowing depreciation to the extent of Rs. 3,05,305 on the value of assets held under hire-purchase." 2. In its computation of income, the assessee has claimed depreciation of Rs. 3,05,305 on its assets held under "Hire-purchase business". The AO has disallowed the claim on the following grounds : "The assessee had changed his method of offering income in respect of assets sold on hire-purchase w.e.f. asst. yr. 1988-89 which was not accepted for reasons stated in the assessment order for 1988-89.

Originally the assessee was dividing the instalment charged on the assets into two parts viz. (1) portion towards principal and (2) finance charges and offering only finance charges as income. But w.e.f. 1988-89 it had changed the method and wanted to offer the entire instalment as income and claimed depreciation on asset. The nature of instalment i.e., whether it is entirely towards hire-purchase or towards lease rental could not have changed unless there was a change in the agreement with the hire-purchaser. Such a change in the agreement was not made. The assessee sells on hire-purchase consumer goods such as TVs &

fridges. The assessee has an eye on the higher depreciation rates brought into effect and in order to derive advantage of higher depreciation rates, shifted its stand about the nature of instalment. The hire-purchaser who is a consumer will not be eligible to depreciation by and large as TVs and Fridges are rarely purchased by business concerns or for business purposes. Such oblique procedures are squarely covered by *Mc Dowell & Co. vs. CTO* (1985) 22 Taxman 11 (SC) case decision of Supreme Court. For the above reasons and also for the reasons stated in the Assessment order for 1988-89 and also for the reasons above, the change in method is rejected. The change resulted in a claim of Rs. 3,05,305 being the difference between depreciation and hire-instalments. This claim is rejected and addition made accordingly (Rs. 33,40,638 minus Rs. 30,35,333)." 3. In first appeal, the CIT(A) accepted the assessee's claim and directed the AO to allow the claim of depreciation after verifying the correctness of the quantum of the claim. The CIT(A) held that the assessee is the owner of the assets and entitled for depreciation and also found that the change in the method of accounting was bona fide.

4. In its books of account, the assessee has written off depreciation only on fixed assets and leased assets. The amount of depreciation is Rs. 44,497 as per Sch. No. 5 attached to the balance sheet. No depreciation has been written off on the assets under hire-purchase agreement. They are shown under "Current Assets".

Therefore, the change in the method of accounting said to be adopted by the assessee is not reflected in its accounts.

5. The method of depreciation has been changed from individual assets to block of assets w.e.f. 1st April, 1988, by virtue of Taxation Laws (Amendment and Misc. Provisions) Act, 1986. The depreciation is to be allowed on the written down value of different block of assets, such as buildings, furniture, fittings, machinery or plant and ships. The assessee has claimed the depreciation on a lump sum adjustment basis in the computation of income. The assessee has not furnished the details such as written down value of the different block of assets included in the "hire-purchase assets".

The assessee has not worked out the quantum of depreciation on block of assets according to the rule. Therefore the change in the method of accounting and the additional claim of depreciation have not been mutually proved, and therefore, on this short ground, the disallowance of Rs. 3,05,305 by way of depreciation is justified.

The finding and order of the CIT(A) on this point is set aside.

6. The ground raised by the Revenue in respect of the depreciation is allowed only on the short grounds considered in para 4 and para 5 above. We have not considered the view of the AO mentioned in the assessment order that the change in the method of accounting was not genuine or the case is covered by Supreme Court decision in McDowell & Co. Ltd. vs. CTO (1985) 22 Taxman 11 (SC) etc. for the purpose of deciding the above issue. Likewise, we have not either sit in judgment on the finding of the CIT(A) that the change in method of accounting was bona fide and the assessee was entitled for depreciation as the rightful owner of the hire-purchase assets.

7. The assessee has disclosed an amount of Rs. 91,710 in its computation of income towards the value of appreciation of the shares and securities held by it. The CIT(A) deleted the amount from the income on the ground that the assessee is entitled to value its stock at cost or market value whichever is less, and therefore, the appreciation worked out on the market value could not be treated as income.

8. We have already considered the nature of holding of the assessee of shares and securities in paras 5.7 to 5.14 above in respect of the asst. yr. 1988-89. We have made a finding that the assessee was holding the shares and securities as investment and not as stock-in-trade. That applies to the impugned assessment year also.

Therefore, any valuation profit/loss could not be relevant for computation of taxable income. On this ground, the deletion of Rs. 91,710 is confirmed. The contention of the Revenue fails.

9. The third ground is that the CIT(A) has erred in deleting the interest under s. 234B which is mandatory. Following the analogy of the finding in respect of interest under s. 217 considered in para 5.24 above for the asst. yr. 1988-89, we hold that the CIT(A) is not justified in deleting the levy of s. 234B interest. His direction on this point is set aside.

1. In its computation of income, the assessee has claimed Rs. 14,59,568 by way of depreciation on "Assets under hire-purchase".

The AO, while processing the return under s. 143(1)(a) disallowed the claim and added back to the income and thereby demanded tax as well as additional tax.

2. The assessee objected to this and filed a petition under s. 154 of the Act, for rectification. The petition was rejected. The assessee took up the matter before the CIT(A) in appeal. The CIT(A) held that the depreciation on hire-purchase assets is a debatable point and therefore not amenable to the prima facie adjustment provided for in s. 143(1)(a). The CIT(A) therefore deleted the add back of depreciation. The Revenue's appeal is against this.

3. We have considered the matter. As rightly held by the CIT(A) the question of depreciation on assets under hire-purchase is a highly debatable issue. There is no legal impediment for the assessee to claim depreciation on its assets held under hire-purchase business as per taxation law provided the assessee sets out the factual matrix with evidence and explanation. The AO has grossly erred in straightaway concluding that those assets were stock-in-trade. The issue of depreciation in this case is not a matter of prima facie adjustment provided for in s. 143(1)(a). Therefore, the CIT(A) is justified in deleting the addition. In the circumstances, the appeal filed by the Revenue is liable to be dismissed.

1. For the asst. yr. 1988-89, the Revenue has raised two grounds-one relating to valuation loss on shares and securities and the other relating to deletion of interest levied under s. 217. Both the grounds are allowed-vide paras 5.16, 5.25 and 5.26.

2. For the asst. yr. 1989-90, three grounds have been raised. Two grounds-one relating to depreciation on assets held for hire-purchase business and the other

relating to interest under s.

234B are allowed-vide paras 6.5 and 6.8.

The other ground relating to the appreciation on account of share valuation is dismissed - vide para 6.9.

3. For the asst. yr. 1990-91, there is only one ground relating to the add back of depreciation of Rs. 14,59,568. That ground is dismissed-vide para 7.3.

9. In the result, the appeals filed by the Revenue for the asst. yr.

1988-89 is allowed, 1989-90 is partly allowed and 1990-91 is dismissed.

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