

आयकर अपीलिय अधिकरण 'डी' न्यायपीठ चेन्नई में।

IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, CHENNAI

माननीय श्री वी. दुर्गा राव, न्यायिक सदस्य एवं

माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।

BEFORE HON'BLE SHRI V. DURGA RAO, JUDICIAL MEMBER AND

HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ **ITA Nos.2938 & 2939/Chny/2017**

(निर्धारण वर्ष / **Assessment Years: 2011-12 & 2013-14**)

REFEX Industries Limited (formerly known as REFEX Refrigerants Ltd.) No. 20, Mooker Nallamuthu Street George Town, Chennai – 600 001.	बनाम/ Vs.	DCIT, Corporate Circle -5(3)/ 5(4) Chennai.
स्थायी लेखा सं./जीआइ आर सं./ PAN/GIR No. AACCR-2495-P		
(□ पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओरसे/ Appellant by	:	Shri T. Banusekar (CA) – Ld AR
प्रत्यर्थी की ओरसे/ Respondent by	:	Shri S. Palani Kumar, Ld. CIT - DR

सुनवाई की तारीख/ Date of Hearing	:	09-12-2021
घोषणा की तारीख / Date of Pronouncement	:	07-02-2022

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals by assessee for Assessment Years (AY) 2011-12 & 2013-14 arises out of separate orders of learned first appellate authority. However, one of the issue is common and therefore, the appeals were heard together and are now being disposed-off by way of this consolidated order for the sake of convenience & brevity. First we

take up appeal for AY 2011-12 which arises out of the order of Ld. Commissioner of Income Tax (Appeals) -3, Chennai, [CIT(A)] dated 29-09-2017 in the matter of assessment framed by Ld. Assessing Officer [AO] u/s.143(3) of the Act on 21-03-2014. The grounds raised by the assessee read as under:

1. For that the order of the Commissioner of Income Tax (Appeals) is contrary to the law, facts and circumstances of the case to the extent prejudicial to the interest of the appellant and is opposed to the principles of equity, natural justice and fair play.
2. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the order of the Assessing Officer is without jurisdiction.
3. For that the Commissioner of Income Tax (Appeals) erred in confirming the disallowance of the write off of the advance of Rs.7,70,16,147/- made to subsidiary company.
4. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the advance to the subsidiary company was towards expenditure incurred in the ordinary course of business of the subsidiary company.
5. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the advance to the subsidiary company written off was loss incidental to the business of the appellant.
6. For that the Commissioner of Income Tax (Appeals) erred in confirming the disallowance of the investment made in subsidiary written off to the extent of Rs.6,75,26,999/-
7. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the write off of the investment made in subsidiary was loss incidental to the business of the appellant.
8. For that the Commissioner of Income Tax (Appeals) erred in confirming the disallowance of loss on account of corporate guarantee given to its subsidiary of Rs.5,08,00,000/-
9. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the loss on account of corporate guarantee given to subsidiary was loss incidental to the business of the appellant.
10. For that the Commissioner of Income Tax (Appeals) erred in confirming the disallowance of depreciation of Rs.4,14,37,734/- on cylinders.
11. For that the Commissioner of Income Tax (Appeals) failed to appreciate that the cylinder sold and returned to the appellant was an asset as per the books of accounts of the appellant and were eligible for depreciation u/s. 32.
12. For that the Commissioner of Income Tax (Appeals) erred in contending that the cylinder was returned by the buyer as defective.
13. For that the Commissioner of Income Tax (Appeals) erred in contending that the cylinder returned was not put to use in the business of the appellant.

2. The Ld. AR advanced arguments, written as well as oral, to assail the orders of lower authorities. Reliance has been placed on various judicial pronouncements, the copies of which have been placed on record. The Ld. CIT-DR advanced arguments in support of the impugned order and filed written submissions. Having heard rival submissions, oral

as well as written and after going through the orders of lower authorities, our adjudication to the subject matter of appeal would be as given in succeeding paragraphs. The assessee being resident corporate assessee is stated to be engaged in refilling / processing of Refrigerant Hydro Fluorocarbons Gases which are used in Air Conditioners, refrigerators and refrigerating equipments.

Assessment Proceedings

3.1 During assessment proceedings, it transpired that the assessee claimed administrative expenses of Rs.1953.43 Lacs, as detailed below, as amounts written-off in the Profit & Loss Account: -

Particulars	Amt. (Rs.)
Advance written off	Rs.770.16 Lacs
Invocation of corporate guarantee	Rs.508 Lacs
Investment written-off	Rs.675.26 Lacs

3.2 All the above write-offs arose out of loss suffered by the assessee on account of investment made by the assessee in its wholly owned subsidiary company (WOS) i.e., Sherisha Technologies (S) Pte. Ltd. (STPL) based at Singapore. It was submitted that in order to have a strong foothold in the international market which would serve assessee's larger business interest, the assessee decided to acquire a company i.e., M/s Kaltech Engineering & Refrigeration Pte. Ltd. (KERPL) in Singapore which was carrying on similar business as that of assessee. As the laws in Singapore did not permit direct investment, the assessee floated WOS M/s STPL through which it started acquiring the shares of KERPL. For the same, due compliance was made with the requirement of the Companies Act, 1956, RBI & SEBI etc. As the target business was in another country, the assessee and STPL took steps to conduct due diligence and thorough background check of KERPL and its promoters

before the deal could be finally concluded. Since STPL had no funds, the assessee incurred aggregate expenses of Rs.770.16 Lacs on account of professional fee, legal fee, travelling etc. These were grouped under the head 'Loans and Advances' in the Balance Sheet with an intention to recover the same from STPL. However, the assessee could not acquire 90% stake in KERPL but stopped at 51% which resulted into disagreement between the assessee and KERPL and the assessee agreed for reversing of entire transaction at a price much lower than the original price at which the earlier 51% was invested by STPL. Accordingly, the amount of Rs.770.16 Lacs as due from STPL became irrecoverable and the same was written-off and claimed as business expenditure. It was submitted by the assessee that the loss was incidental to the business and spent only for conducting due diligence and thorough background check of the target Singapore Company in which assessee had proposed to invest and acquire the business in order to expand its existing business in international market. Since the assessee could not achieve the target, the amounts incurred were claimed as loss incidental to the business.

3.3 The assessee had also given corporate guarantee for the loans taken by STPL from Axis Bank for target investment in KERPL. Since the acquisition plans were called-off, STPL was unable to pay the loan and Axis Bank invoked corporate guarantee against the assessee. Finally, the assessee had to repay a sum of Rs.508 Lacs to the Bank. Since the same was irrecoverable, it was written-off in the Profit & Loss Accounts and claimed as legitimate business loss u/s 37(1).

3.4 The last write-off of Rs.675.26 Lacs arises due to the fact that on account of the inability of the assessee to acquire KERPL, the shares

were re-transferred to KERPL. As a result, STPL was reduced to a shell company as the objective of the entire exercise was terminated midway. Since the assessee had to exit the misadventure, the losses suffered on account of investment in STPL were claimed as losses incidental to business in terms of provisions of Sec.28.

3.5 However, Ld. AO noted that the aforesaid losses / expenditure were incurred for the purpose of acquiring another entity. Therefore, the expenditure would be capital in nature which was evident by the fact that all these advances were shown as 'loans and advances' in the Balance Sheet of the assessee company up to 31.03.2010. These advances were not in the nature of trade advances which were made during the normal course of business and these advances were never offered as income in any of the earlier previous years. Therefore, the deduction of write-off of the same would not be allowable to the assessee. Similarly, corporate guarantee was given by the assessee to fund take-over of another entity and therefore, the expenditure would be capital in nature. The investment made by the assessee was capital in nature and the diminution in the value of the same could not be claimed as revenue expenditure and the loss thus suffered was not in the normal course of assessee's business.

3.6 To reject the assessee's claim, reliance was placed on the decision of **Hasimara Industries Ltd Vs CIT [230 ITR 927 (SC)]**, wherein irrecoverable advances made by assessee to licensor / lessor was held to be capital loss since the investment was made to start new business and hence, not deductible. Reliance was also placed on the decision of Tribunal in **Kwality Fun Foods & Restaurants (P) Ltd. (108 ITD 274)** wherein the assessee had advanced certain amounts to a contractor for

construction of cold storage plant at its factory. The project could not be executed and the advances lost by the assessee were claimed as loss. However, it was held that the advances were made to secure capital advantage and the expenditure was incurred towards the cost of acquiring new profit earning apparatus. Therefore, it was held to be in capital field and not allowable as bad-debts. Drawing analogy from the same, the claim of the assessee was disallowed.

3.7 Another issue which is subject matter of dispute before us is assessee's claim of depreciation on cylinders. The same was denied by Ld. AO on the ground that the addition to cylinders during the year was nothing but sales return. Accordingly, depreciation of Rs.414.27 Lacs as claimed by the assessee was disallowed.

Appellate Proceedings

4.1 During appellate proceedings, the assessee reiterated that the whole idea of advancing the money to STPL was to get control over KERPL which was in the same line of business. By acquiring this entity, the assessee could import the refrigerant gases from Singapore in accordance with its main object which was to manufacture & deal in cylinders. For the said purpose, the assessee could enter into partnership or into any other arrangements for sharing of profits, co-operation, amalgamation, union of interest, joint venture, reciprocal concession or otherwise with any another entity. In line with the same, the investments were sought by the assessee. The amount advanced to STPL was in accordance with assessee's main objects and loss suffered there-from was an allowable expenditure / business loss. Reliance was placed on the favorable decision of Hon'ble Bombay High Court in the case of **Colgate Palmolive (India) Ltd (370 ITR 728)** which was

rendered after considering the decision of Hon'ble Supreme Court in the case of **Patnaik and Co. (161 ITR 365)**. Similarly, the amount of Rs.508 Lacs paid by assessee towards corporate guarantee would be allowable deduction since the assessee stood guarantor for STPL. The guarantee was given with a view to fund the takeover of KERPL by STPL. The loss thus incurred would be allowable u/s. 37(1) of the Act as per decision of Chennai Tribunal in **ACIT Vs W.S Industries (India) Ltd (ITA No. 1373/Mds/2008 dated 21-08-2009)**, wherein it was held that assessee had guaranteed the loan in its carrying on of business and the loss was admissible deduction. For the same, the Tribunal had followed the decision of Hon'ble High Court of Madras in **CIT Vs Amalgamations P. Ltd (108 ITR 895)** which was affirmed by Hon'ble Supreme Court reported at 226 ITR 188. Further, the decision of Hon'ble Supreme Court in the case of **S.A. Builders (288 ITR 1)** was also applicable wherein it was held that expenditure incurred on commercial expediency in trying to retrieve its investments in subsidiary would be allowable deduction.

4.2 Regarding depreciation on cylinders, it was submitted that the cylinders were earlier sold out and repurchased this year. The Ld. AO mistakenly took this transaction as sales return. It was reduced from the block of asset in earlier years when it was sold and when the buyer returned the same, the same was added to the block of asset and depreciation was claimed on the same. The same was stated to be in accordance with the provisions of law.

4.3 The assessee's submissions were subjected to remand proceedings and a remand report was received from Ld. AO which was countered by the assessee.

4.4 After considering the material on record including the remand report, the Ld. CIT(A) observed that the assessee had advanced amount to its subsidiary for acquiring shares in another company which was in the nature of investment. Therefore, any advances thus lost and written-off as irrecoverable would be loss of capital and not loss in regular course of business and therefore, it could not be allowed as business expenditure. The sole purpose of the investment was to acquire shares of another company and therefore, the advances could not be considered as advances in regular course of business. Hence, the same was rightly held by Ld. AO to be capital loss.

4.5 Regarding assessee's claim of depreciation on cylinders, the same was held to be rightly denied since the assessee was unable to substantiate its claim by filing any evidence to show that the cylinders when sold were reduced from the block of assets, Further, the cylinders were rejected by the buyers as defective. For depreciation claim to be admissible, the asset should be owned by the assessee and should be used for the purpose of business. Since the cylinders were rejected goods, the assessee could not use the same at all. Therefore, the claim was rightly rejected.

4.6 Aggrieved as aforesaid, the assessee is in further appeal before us.

Our findings and Adjudication

5. First we take up the issue of various write-offs claimed by the assessee during the year. From the factual matrix as enumerated in preceding paragraphs, it could be gathered that the assessee was engaged in refrigerant gases which are used mostly in Air Conditioners, refrigerators and refrigerating equipments. With a view to expand its

business and with a view to facilitate import of gases, the assessee decided to acquire a Singapore entity i.e. KERPL. Since the statutory framework did not permit the assessee to make direct investment, the assessee floated another wholly owned subsidiary i.e. STPL to facilitate the acquisition. The acquisition of KERPL would have enabled the assessee to carry on its business more smoothly and in a more profitable manner since it would have provided assessee a strong foothold in the international market and would have served larger business interest of the assessee. The same is supported by the fact that M/s KERPL was engaged in the same line of business as that of assessee. To facilitate such an acquisition, necessary permissions from statutory authorities viz. RBI, SEBI etc. were taken and due compliance was made with the requirement of the Companies Act, 1956. For the same, the assessee took steps to conduct due diligence and thorough background check of KERPL and its promoters before the deal could be finally concluded. Since STPL was wholly owned subsidiary of the assessee, it had no independent source of income and fully dependent upon assessee to fund the acquisition and to incur related expenditure. The expenditure of Rs.770.16 Lacs was spent by the assessee towards professional fee, legal fee, travelling etc. Such expenditure was grouped under the head 'Loans and Advances' in the Balance Sheet with an intention to recover the same from STPL. However, unfortunately, the assessee could not acquire 90% stake in KERPL as planned but stopped at 51% which resulted into disagreement between the assessee and KERPL. Consequently, entire transaction was reversed and in the process, the assessee suffered losses. The amount of Rs.770.16 Lacs as due from STPL became irrecoverable and the assessee had no

option but to write-off of the same. Similarly, the assessee had advanced bank guarantee on behalf of STPL so as to fund the acquisition. But since the acquisition did not happen and STPL was unable to pay the Bank Loan, the guarantee against the assessee was invoked and the assessee had to pay an amount of Rs.508 Lacs on account of bank guarantee. The last write-off of Rs.675.26 Lacs arises on account of assessee's inability to acquire KERPL, the shares were re-transferred to KERPL. As a result, STPL was reduced to a shell company as the objective of the entire exercise was terminated midway. The value of the investment made by the assessee was reduced substantially and the loss thus suffered by the assessee was claimed as write-off in the Profit & Loss Account.

6. We find that all the three write-off were part and parcel of the same transaction and arose in the course of assessee's efforts to run its business more smoothly and in a more profitable manner. Had the acquisition been materialized, the assessee would have benefitted by way of increase in business and better trading results. Therefore, it could be well said that the acquisition was in the normal course of assessee's business with a view to improve trading results. Any loss arising therefore, thus, was to be viewed as loss in the revenue field and not in capital field as erroneously held by lower authorities. All the above stated facts would lead to a conclusion that the investments were in furtherance of business interest of the assessee and were made out of commercial expediency. The main purpose of investment was not to acquire any manufacturing capacity or any infrastructural capacity but the main purpose was to boost assessee's sales. Therefore, the investments

could not be said to be in capital field rather the same were meant to improve the top line of the business by way of higher revenue profits.

7. We find that the issue on similar factual matrix is squarely covered by the cited decision of Hon'ble Bombay High Court in **CIT V/s Colgate Palmolive India Ltd. (370 ITR 728)** wherein it was held that loss in investment out of commercial expediency would be an allowable deduction. This decision of Hon'ble Bombay High Court has been followed by Hon'ble Karnataka High Court in **ACE Designers Ltd. V/s ADIT (120 Taxmann.com 321)** wherein the assessee was engaged in the business of manufacture and export of computerized numerical controlled machines. It made investment in equity of its wholly owned subsidiary company situated in USA. However, the said subsidiary could not perform and was wound up. The loss so suffered was claimed as 'business loss' on the ground that investment was made for purpose of business. The Hon'ble Court held that since the investment was made for enhancement of business activity of assessee in global market which primarily related to business operation of assessee and the investment was not made with a view to create capital asset in the form of holding shares, the said loss would be a business loss allowable u/s 28(i).

The Hon'ble Supreme Court in **Patnaik & Co. Ltd. V/s CIT (161 ITR 365)** held that where the government bonds or securities were purchased by the assessee with a view to increase its business, the loss incurred on the sale of such bonds or securities was allowable as 'business loss'. The decision of Hon'ble High Court of Madras in **CIT V/s Amalgamation Pvt. Ltd. (108 ITR 895)** also support the same view. In this decision, it was also held by Hon'ble Court that loss arising to assessee out of guarantee given on behalf of subsidiary sprang out of

normal business transaction and the loss was an allowable deduction. This decision of Hon'ble Court has been followed by Chennai Tribunal in **ACIT Vs W.S Industries (India) Ltd (ITA No. 1373/Mds/2008 dated 21-08-2009)** and held that guarantee given by the assessee was in the course of its carrying on of business and the loss was admissible deduction as business loss. Similar is the ratio of other decisions of Tribunal as placed on record by Ld. AR.

8. The Ld. CIT-DR, in the written submissions has sought to counter the arguments of Ld. AR. It has been submitted that clauses in Memorandum of Association do not support the case of the assessee. The Ld. CIT-DR has referred to the decision of Hon'ble Supreme Court in the case of **A.V.Thomas & Co. V/s ITO (48 ITR 67)** which held that Memorandum of Association is not a conclusive proof as to the real nature of transaction and the nature of transaction has to be deduced not from the Memorandum but from the circumstance in which the transaction took place. There could be no quarrel as to this proposition. In fact, our adjudication is not based on the clauses in the Memorandum of Association but from the circumstances in which the transactions have taken place. It could also be gathered that the investments made by the assessee did not suffer from any infirmity or any statutory violations and due approvals of regulatory authorities were duly taken by the assessee to make the investments in the target company.

9. The case law of **Hasimara Industries Ltd Vs CIT (230 ITR 927) (supra)**, as referred to by Ld. AO, deal with a loss of deposit made by the assessee to acquire a profit-making asset to carry on new business in cotton and accordingly, the loss was held to be capital loss. However, same is not the case here since in the present case the assessee

intended to acquire another entity with a view of run business more profitability and the other entity was in the same line of business as that of assessee. Similarly, in the case law of Tribunal in **Kwality Fun Foods & Restaurants (P) Ltd. (108 ITD 274)**, it was finding of the bench that the expenditure was incurred towards cost of acquiring profit earning apparatus and therefore, the expenditure was held to be in capital field. The same is not the case here.

10. Finally, on the given facts and circumstances, we concur with the submissions of Ld. AR that the investments in subsidiaries were made in the normal course of assessee's business to make business more profitable. Therefore, the resultant loss suffered by the assessee was rightly claimed as revenue expenditure / business loss by way of write-off in the Profit Loss Account. We order so. Accordingly, we direct Ld. AO to allow these three write-offs as deduction as claimed by the assessee. The grounds thus raised stand allowed.

11. The second issue is assessee's claim of depreciation on cylinder. Upon perusal of depreciation schedule for the year ending 31.03.2009 (page 54 of the paper book), it could be seen that the assessee has reduced gross block of 60% by an amount of Rs.836.91 Lacs. The reduction include sale of cylinders by the assessee on 31.03.2009 to two parties i.e. M/s Vijay Traders & M/s Silver Lining Enterprises. For the same, the assessee had raised excise invoices and also charged applicable VAT on sale of cylinders. However, these cylinders have subsequently been returned on 15.06.2010 by these two parties which is quite evident from the copies of credit notes issued by the assessee to both these parties. Consequently, the block for this year has been increased to that extent and depreciation, as applicable, has been

claimed on the same by the assessee. These transactions are duly evidenced by Tax Audit Report and Extracts of financial statements as placed on record. The Ld. AO has denied the depreciation on the ground that the same represent sales return. However, the said reasoning could not result into denial of depreciation to the assessee since upon sale of cylinders, the block of asset was reduced whereas on receipt of the same back by the assessee, the gross block was increased accordingly. Therefore, we find no infirmity in the claim of the assessee. If the logic of Ld. AO was to be accepted that the same was merely sales return, the loss thus suffered would be allowed in full as trading loss. Therefore, we direct Ld. AO to allow the depreciation on cylinders as per assessee's claim. This ground stand allowed. The appeal stand allowed in terms of our above order.

Assessee's Appeal for AY 2013-14

12. One of the grounds in assessee's appeal for AY 2013-14 is with respect to assessee's claim of depreciation on cylinder. It is agreed position that the adjudication of AY 2011-12 shall apply to this year also. For this year, an assessment was framed by Ld. AO u/s 143(3) on 29.02.2016. The Ld. AO denied depreciation on cylinders by treating the transactions merely as sales return. The Ld. CIT(A) confirmed the action of Ld. AO by relying upon appellate order for AY 2011-12. Aggrieved, the assessee is in further appeal before us. Facts being pari-materia the same, our findings as well as adjudication of the issue as done in AY 2011-12 shall mutatis mutandis apply to this year also. Accordingly, Ld. AO is directed to allow the depreciation as per assessee's claim. The ground thus raised stand allowed.

13. The second ground of assessee's appeal is disallowance of interest on tax deducted at source. The assessee claimed interest on TDS for Rs.3.04 Lacs which was disallowed by Ld. AO. The Ld. CIT(A) confirmed the disallowance by observing that interest on TDS was akin to Income Tax Payment. Aggrieved, the assessee is in further appeal before us. We find that this issue stood against the assessee by the decision of Hon'ble High Court of Madras in **CIT V/s Chennai Properties & Inv. Ltd. (239 ITR 435)** wherein it was held that interest takes color from nature of principal amount required to be paid but not paid in time and this principal amount being income-tax, interest is in nature of a direct tax and settlement of income-tax payable under Act and, therefore, same cannot be regarded as compensatory payment. Therefore, the same could not be allowed as business expenditure. Respectfully following the same, we confirm the disallowance and dismiss this ground of appeal.

14. The appeal stands partly allowed.

Conclusion

15. The appeal for AY 2011-12 stands allowed whereas the appeal for AY 2013-14 stands partly allowed.

Order pronounced on 07th February, 2022.

Sd/-

(V. DURGA RAO)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(MANOJ KUMAR AGGARWAL)

लेखक सदस्य / ACCOUNTANT MEMBER

चेन्नई / Chennai; दिनांक / Dated : 07-02-2022

JPV

आदेश की प्रतिलिपि ँ ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकर आयुक्त (अपील)/CIT(A)

4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF