

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "F", MUMBAI
BEFORE SHRI N.K.BILLAIYA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER**

ITA No.6546/Mum/2010

Assessment Year: 2005-06

Shri Vijay Damodarapur Chandran, D-6, Nav Monica CHS Ltd, CST Road, Opp. University Campus, Kalina, Santacruz (East), Mumbai-400098. PAN: AACPD3924A	Vs.	CIT(A) XIX, Mumbai.
(Appellant)		(Respondent)

ITA No.6547/Mum/2010

Assessment Year: 2006-07

Shri Vijay Damodarapur Chandran, D-6, Nav Monica CHS Ltd, CST Road, Opp. University Campus, Kalina, Santacruz (East), Mumbai-400098. PAN: AACPD3924A	Vs.	CIT(A) XIX, Mumbai.
(Appellant)		(Respondent)

Assessee by : Shri Aarti Sathe

Revenue by : Shri Pawan Kumar Beerla (DR)

Date of hearing : 02.12.2015

Date of Pronouncement : 15.01.2016

ORDER

PER PAWAN SINGH, JM:

1. These two appeals filed by the assessee were heard together as common grounds of appeals are raised in both the cases and the same are in respect of Assessment Year (AY) 2005-06 & 2006-07 against the order of CIT(A)-30, Mumbai dated 29.08.2008 & 23.01.2009 respectively, the grounds of appeal raised in ITA No. 6546/Mum/2010 are as under:

On the basis of the facts and circumstances of the case and in law the learned CIT(Appeals) has erred in confirming that -

1. The income from short-term capital gains of Rs.7,31,715/- is income from business.

2. In concluding that I have carried out share trading activity through PMS.

3. In holding that appreciation earned by me through the management of my portfolio by PMS operator is business income.

4. In assuming that my motive is to do trading in shares and not earn through appreciation in the value of shares in the changing share market scenario, when I hand over my funds to the Portfolio Manager.

5. In holding that taking help of expert amounts to trading in shares.

6. In disallowing the short term capital loss of Rs.41,431/-.. u/s 94(7) of the income tax by applying dividend stripping provisions without ascertaining the motive as to tax avoidance.

7. In not allowing loss of Rs. 3489 from Mutual fund to be set off against the Income.

With the permission of your honor, the appellant may plead any additional ground /grounds during the course of appeal.

2. First we shall take up appeal No. 6546/2010. The brief fact of the case are that assessee who is an individual, filed his return of income for AY-2005-06 on 25.08.2005 declaring total income of Rs. 17,21,049/-. The return of income was selected for scrutiny u/s 143(2) on 28.08.2006. Statutory notice was served upon the assessee and after giving the opportunity of hearing, the Assessing Officer (AO) has passed the order of assessment, while making the assessment the AO disallowed a sum of Rs. 3914/- u/s 10(33) and Rs. 41,431/- on account of capital gain and further treated the income of Rs. 7,31,715/- as income from business instead of Short Term Capital Gain (STCG) as claimed by assessee and initiated penalty proceeding in the assessment order dated 14.12.2007 against which the appeal was filed before the CIT(A).
3. The Id. CIT(A) while disposing of the appeal of the assessee, confirmed the addition by treating it as "Business Income" and further confirmed the addition of Rs. 41,131/-, however, the ground of dividend of Rs. 3914/- received from co-operative bank was restored to the file of AO for verification, if the same is included in the total income of

the assessee in its order dated 29.01.2008 against which the present appeal is filed before us.

4. We have heard the Authorised Representative (AR) of the assessee and Departmental Representative (DR) of the revenue and have gone through the material available on record.
5. While treating business income of Rs. 7,31,715/-, instead of STCG, the AO observed that assessee has offered STCG of Rs. 3,80,683/- in respect of transaction for the period 01.04.2004 to 30.09.2004 on the sale of share in securities of Rs. 7,31,715/- and remaining Rs. 3,51,032/- for the remainder of financial year at 10% u/s 111A and thus claimed exemption u/s 10(36) for Rs. 3,48,117/-, the assessee further disclosed LTCG of Rs. 2,24,591/- prior to 01.10.2004 and capital loss of Rs. 26,672/- for the period from 01.10.2004 to 31.03.2005 and the AO asked the assessee on the issue of taxability of capital gain as "Business Income" for which the assessee made response vide letter dated 20.09.2007 and contended that assessee has been investing in Bank Deposit Saving Bonds of the Government share and debenture and has placed fund to ASK Raymond James Securities Pvt. Ltd. and Fortis Securities Ltd. and further contended that STCG is mainly income from investment and not trading income.
6. The contention of the assessee was not accepted by the AO and the AO observed that during the period relevant to the assessment year, the assessee purchased share of Rs. 84,58,260/- and sold for Rs. 93,34,115/- to accrue STCG of Rs. 7,31,715/- and after deducting Portfolio Management Fees (PMS) the total transaction entered into for occurring STCG are 448/- out of which the period of holding into 266 instances is less than 4 month and 97 instances is within a period of 1 month in another 188 instances it is within the period of 3 months and that selling of share by assessee was to maximise profit on the amount of money kept at the disposal of institution.
7. The AO further observed that the volume and frequency of the transaction is very high as indicated by him. The AO further observed that assessee has deducted Rs. 3489/- as a loss on or redemption of unit in Frankling Tampilton and the same was not allowed to be set off against the STCG assessed as business income and held that the loss can be carried forward for set off for subsequent years and thus total Rs. 7,31,715/- was treated as STCG as business income along with Rs. 41,431/- which was disallowed u/s 94(7) of the Act.
8. The Id. CIT(A) while dealing with the ground has observed that the assessee is carried out share trading activity through PMS and invested with ASK Raymond James

Securities Pvt. Ltd. and Fortis Securities Ltd. and the CIT(A) observed that STCG disclosing the return of income pertains to the buying and selling of share under PMS scheme. The PMS expert professional are involved who are continuously engaged in the trading of share to maximise profits of their and their clients which is opposed to the ordinary individual making investment casually and without any expert knowledge and concluded that buying and selling of share through PMS is trading activity and the same has to be assessed as business income only and confirmed the action of AO.

9. The AR of the assessee has argued that to maximise the return from the funds invested Rs. 18,00,000/- with ASK Raymond James Securities Pvt. Ltd., Rs. 5,00,000/- for cash and further Rs. 5,25,00,00/- in the form of share with Fortis Securities Ltd. is concerned is purely investment under PMS with the objective to best return in the form of dividend or capital appreciation and having no expertise and the investment is handled by PMS operators and further argued that AO do not raised the issue of treating STCG as business income during the assessment proceedings. The AR of the assessee placed on record the copy of order of CIT(A) in respect of AY-2007-08 wherein the CIT(A) dealing with the similar issues the income of assessee from similar transactions were considered under the head "Capital Gain".
10. We have heard the rival contentions of the parties and perused the material available on record and find that in the subsequent year the revenue in assessee's own case has treated the income from PMS as STCG instead of business income and thus for keeping in view the principle of consistency, the revenue must not take different stand for different AY.
11. The Hon'ble Delhi High Court in Redial International Vs Asst. CIT, reported viz (2014) 367 ITR 1, held : *Investment of share under portfolio management agreement and share held for long time , profit from such sale of shares are not assessable as business income.*
12. Coordinate bench of ITAT Mumbai in ITA No. 5382/M/2009, titled as ITO Vs Radha Birju Patel also taken a similar view by treating the same as STGC instead if business income, hence we are also of the opinion that the finding of AO for treating the income from PMS is income from business and not STGC, are erroneous and the same is set-aside, and we direct the AO to treat the income from PMS as income on account of STGC, Thus this ground of appeal is accepted.
13. The next ground for our consideration is disallowance of STCL of Rs. 41,431/- u/s 94(7) of the Act. While dealing with this addition/disallowance, the AO observed that

assessee failed to show the dividend of Rs.3914/- received from North Canara Sarswat Bank as the same is co-operative bank and the income does not fall under the purview of section 10(33) and the same subject to tax, further, the assessee purchased a mutual fund of Birla MIP on 12.04.2004 for Rs. 5,00,000/- and sold the same on 14.12.2004 for Rs. 4,86,702/- and claimed loss of Rs. 16,298/- under the head "Capital Gain". On the other hand, the assessee received a dividend of Rs. 24,350/- and the loss which was not allowed as dividend income was more than the loss occurred. The AO further noticed that the assessee purchased funds of Principle Asset Management Company on 12.04.2004 for Rs. 5,00,000/- and sold on 14.12.2004 on a loss of Rs. 14,074/- and noticed that assessee received dividend of Rs. 24,455/- and the loss was not allowed as a dividend was more than the loss of the assessee and further purchased mutual fund of Tata dividend yield fund on 12.04.2004 for Rs. 5,00,000/- and sold the same on 14.12.2004 on the loss of Rs. 11,059/-. The assessee received dividend of Rs. 17,827/- and on the same ratio not allowed the loss of Rs. 11,059/-, thus a total of Rs. 41,431/- was added to the total income of the assessee under the head STCG.

14. The CIT(A) while dealing with this issue has observed that AO applied the provision correctly on dividend stripping by discussing all the issues in detail and confirmed the addition.
15. AR of the assessee argued that assessee had invested an amount of Rs. 5,00,000/- each in three mutual fund with a view to earn monthly income, the assessee has received regular income from these funds and after some time in the month of December, 2004 switched over from MIP to other scheme of mutual fund, the nature of the scheme is to get monthly income, once the income is declared the NAV of this scheme jointly gets reduced and some time below par and further argued that a mutual fund scheme is declared dividend considering the availability of cash alternative source of investment etc. In mutual fund scheme, the dividend is declared by the fund management and is not known at the time of investment.
16. The CIT(A) while dealing with this ground observed as under:

This issue has been dealt by AO in para-4 of assessment order which is reproduced as under:

"i) On verification of the records, it is found that the assessee has purchased mutual funds of Birla MIP on 12.04.2004 for Ps.5,00,000/- and has sold the same on 14.12.2004 for Rs. 4,86,702/- The assessee has claimed the loss of Ps. 16,298/- on sale of mutual funds under the head 'capital gains'. But it/s found that assessee has received dividend of Rs. 24,350/-. As per provisions of section 94(7) this loss is not allowed, as the dividend earned is more than the loss incurred on sale of mutual fund units. Hence, the loss claimed of Rs. 16,298/- is

disallowed and added back to the income of the assessee under the head 'capital gains'.

ii) Assessee has purchased mutual funds of Principal Asset management Co. in 12-04-2004 for Rs. 5,00,000/- and has sold the same on 14-12-2004 for Rs. 4,85,926/- The assessee has claimed the loss of Rs. 14,074/- on sale of mutual funds under the head "Capital Gains". But it is found that assessee has received dividend of Rs. 21,455/- As per provisions of section 94(7) this loss is not allowed as the dividend earned is more than the loss incurred on sale of mutual fund units. Hence the loss claimed of Rs. 14,074/- is disallowed and added back to the income of the assessee under the head "Capital Gains".

iii) Assessee has purchased mutual funds of Tata Dividend Yield Fund on 12-04-2004 for Rs. 5,00,000/- and has sold the same on 14-12-2004 for Rs. 4,88,941/- The assessee has claimed the loss of Rs. 11,059/- on sale of mutual funds under the head 'Capital Gains' But it is found that assessee has received dividend of Rs. 17,827/- As per provisions of section 94(7) this loss is not allowed as the dividend earned is more than the loss incurred on sale of mutual fund units. Hence the loss claimed of Rs. 11,059/- is disallowed and added back to the income of the assessee under the head "Capital Gains".

17. We have carefully examined the order of AO and the CIT(A) and we have to see if section 94(7) of I.T. Act is applicable or not, we have noticed that the assessee purchased mutual fund of three different companies on 12.04.2004 and sold on 14.12.2004 on a total loss of Rs. 41,431/-, thus, all the transaction/sale/purchase were made within 9 months, hence, the assessee is not entitled to claim STCL.
18. The finding of the AO which was confirmed by the CIT(A) does not require any interference at our end, resultantly, the finding of CIT(A) are confirmed.
19. The appeal of the assessee on this ground is dismissed.
20. Next ground which is in respect of not allowing loss of Rs. 3489/- from mutual fund to set off against the income, this ground was not pressed during the making of submission of the present case, hence the same is dismissed being as not pressed.
21. In view of the above discussion, the appeal filed by the assessee is partly allowed.
22. Now we shall take up the **Appeal No. 6547/Mum2010** wherein the assessee raised the following grounds:

On the basis of the facts and circumstances of the case and in law the learned CIT(Appeals) has erred in confirming that –

1. The income from short-term capital gains of Rs. 15,28,558/- as income from business.

In concluding that I have carried out share trading activity through PMS.

3. In holding that appreciation earned by me through the management of my portfolio by PMS operator is business income.

4. In assuming that my motive is to do trading in shares and not earn through appreciation in the value of shares in the changing share market scenario, when I hand over my funds to the Portfolio Manager.

5. In holding that taking help of expert amount to trading in shares.

With the permission of your honor, the appellant may plead any additional ground /grounds during the course of appeal.

23. As we have noticed that only one substantial ground is raised i.e. treating the business income instead of STCG. We have already decided the identical issue in the connected appeal mentioned as above in appeal No. ITA No. 6546/M/2010 and allowed the appeal of assessee on the similar ground, hence, keeping in view the principle of consistency, we allowed this ground in favour of the assessee.
24. In the result, the Appeal No. 6546/M/2010 is partly allowed and Appeal No. 6547/M/2010 is allowed.

Order pronounced in the open court on this 15th January 2016.

Sd/-

(N.K.BILLAIYA)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 15/01/2016

S.K.PS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

Sd/-

(PAWAN SINGH)

JUDICIAL MEMBER

आदेशानुसार/BY ORDER,

उप/सहायकपंजीकार

(Asstt.Registrar)

आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai