

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE 'B' BENCH, BANGALORE**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

**ITA No.123(BNG)/2012
(Assessment year : 2001-02)**

Shri C.Bharat Kumar,
M/s C.B.Electricals,
No.24, AM Lane, Chickpet Cross,
Bangalore.

Appellant

Vs

The Income-tax Officer,
Ward-5(3),
Bangalore-560 001

Respondent

**Assessee by : Shri H.N.Khincha, CA
Revenue by : Shri Nambirajan, JCIT**

**Date of hearing : 09-12-2015
Date of pronouncement : 08-01-2016**

ORDER

PER SHRI INTURI RAMA RAO, AM :

This appeal filed by the assessee is directed against the order of the learned CIT(A)-II, Bangalore, dated 23-12-2011 for the assessment year 2005-06.

2. The assessee raised the following grounds of appeal;

"1. The ld AO had erred in passing the order in the manner passed by him and the ld.CIT(A) has erred in confirming the same. The order passed is bad in law and is liable to be quashed.

2. The AO and CIT(A) have erred in treating the transactions in shares as big speculative in nature. There is no transaction which is speculative in nature. The conclusion

arrived by authority below are on a wrong and improper perception of the fact. On proper appreciation of facts it is to be held that there is no speculative transaction.

3. In any case, the AO had erred in not setting off the loss of Rs.18,48,516/- against other income of the assessee. The CIT(A) has erred in confirming the same. The action of the authority below in not allowing setting off of the loss is against the principle of law and is to be disregarded. The set off of loss as claimed by assessee being correct is to be allowed.

4. In view of the above and on other grounds to be adduced at the time of hearing it is requested that it be held that the returned transactions are not speculative in nature and the set off of loss as claimed by the assessee is accepted”.

3. Briefly, the facts of the case are that the assessee is an individual deriving income from the business of electrical goods and trading in shares. The return of income for the assessment year 2001-02 was filed and the assessment was completed originally u/s 143(3) vide order dated 28-003-2002 at a total income of Rs.16,06,097/-. While doing so, the AO had not

allowed the set off of loss of Rs.18,48,516/- incurred in trading of shares by holding it to be speculative loss.

4. Being aggrieved by this order an appeal was filed before the CIT(A) who vide impugned order dated 03-10-2002 upheld the action of the AO. The assessee further carried the matter to the Tribunal, the Tribunal vide order dated 31-05-2005 in ITA No.1455(B)/2002 remanded the issue back to the file of the AO with the following directions;

“6. The delivery contemplated by sec.43(5) need not be actual but even constructive or implied a was held by the Hon’ble Supreme Court in the case of Duni Chand Rataria (Supra). The AO may have to accept the case of constructive or implied delivery as the actual delivery within the meaning of the aforesaid provisions. The assessee has produced copies of Stock Exchnage Procedures and Regulations of settlement of transactions. All these were not produced at the time of hearing before the AO. The AO may have to examine the issue in the light of these procedures and should also keep in mind advancement of procedures in relation to trding in shares. We therefore, in the interest of justice, set aside the entire issue back to the file of the AO with a direction to decide

the same in accordance with law after going through the settlement procedures in the Stock Exchange as well as to consider the copies of detailed contract notes produced by the assessee, which according to the assessee, evidences the fact of constructive delivery. The detailed contract notes issued by M/s Sunil Agencies in respect of all the transactions of the assessee may have to be looked into by the AO. The AO shall therefore, re-decide the issue in accordance with law and keeping in view the principle laid down by the Apex Court in the case of Duni Chand Rataria (Supra) Needless to say the assessee shall be given a fair and reasonable opportunity of being heard in the matter”.

5. Pursuant to this order of the Tribunal, the O has completed the assessment u/s 143(3) r.w.s. 254 of the IT At, 1961. Vide order dated 31-03-2006 reiterating the original assessment order. The ‘AO observed that the loss incurred by the assessee is only in the nature of speculative transactions and further observed that according to the bye-laws of the Bangalore Stock Exchange there is no constructive or implied delivery and

further held that the decision of the Hon'ble Supreme Court in the case of Duni Chand Rataria cannot be applied to the facts of the present case.

6. Being aggrieved, appeal was filed before the CIT(A), who vide impugned order had confirmed the action of the AO.

7. Being aggrieved by the order of the lower authorities the assessee is in appeal before us.

8. We have heard the rival submissions and perused the material on record.

8.1 The AO passed the order pursuant to the directions given by the Hon'ble Tribunal. It is established law that while passing a consequential order pursuant to appellate order, the AO cannot travel beyond the scope of the directions issued by such appellate authorities. In this case, the Hon'ble Tribunal had clearly held that a constructive or implied delivery is to be treated as delivery as contemplated by the provisions of sec.43(5) of

the IT Act, 1961. The matter was remanded to the file of the AO only for the limited purpose of examining the issue whether there was a constructive or implied delivery as per the rules and regulations and prevailing practices of stock exchange. Though, the AO examined all the rules and regulations of the stock exchanges, but never referred to any rule which shows that the impugned transactions cannot be treated as a constructive or implied delivery. The whole case of the assessee is that in case of squared up transactions there is a constructive or implied delivery. Therefore, the transactions does not fall within the mischief of Sec.43(5) of the IT Act, 1961. From the rules and regulations, it is clear that the expression implied or constructive delivery are not used anywhere, but the provisions of bye-laws-91 talks of netting of the delivery of the scripts at the end of the settlement cycle. It is also material to note that the provision of stock exchange does not deal with non-delivery based scripts. This only goes to show that the netting of transactions at the end of settlement cycle there is a constructive or implied delivery of scripts. Further, the Hon'ble Andhra Pradesh High Court in the case of CIT Vs Lakshminarayana Trading Co. after referring the decisions of the Hon'ble Supreme Court....

- a. *CIT Vs Puttaiah Seshaiah & Co. (1984) 146 ITR 168 (AP)*
- b. *CIT Vs Shantilal Pvt.Ltd (1983) 144 ITR 57(SC)*
- c. *Davenport & Co.Pvt.Ltd Vs CIT (1975) 100 ITR 715 (SC)*
- d. *Jute Investment Co.Ltd. Vs CIT (1980) 121 ITR 56 (SC)*
- e. *Raghunath Prasad Poddar Vs CIT (1973) 90 ITR 140(SC)*
- f. *Sind National Sugar Mills Pvt. Ltd Vs CIT (1980) 121 ITR 742(Bom.)*

and its earlier decisions in the case of *CIT Vs Puttaiah Seshaiah & Co. (1984) 146 ITR 168 (AP)* held as follows;

“After considering the definition of ‘speculative transaction’ contained in clause(5) of section 43, it was observed that the law and spoken of a settlement of the contract and a contract was settled when it was either performed or the promise dispensed with or remitted, wholly or in part, the performance of the promise made to him or accepted, instead of it, any satisfaction which he thought fit and in that sense section 43(5) had to be understood and it was held that the transaction could not be described as a speculative transaction within the meaning of clause(5) of section 43 as there was a breach of the contract and on a dispute between the parties damages were awarded as compensation y way of arbitration award. The question was thus answered in the affirmative and in favour of the assessee and against the revenue.

In view of the above discussion of case law with regard to the provisions of sec.43(5), we may now revert to consider the scope of that section under general principles. Any trader in commodities generally intends to buy and sell the commodity with a stipulation that the delivery of the commodity by the seller to the purchaser is an essential ingredient of that transactions. Under the sale of goods Act, such delivery can be made either by physical delivery of the commodity directly to the purchaser or to the carrier for him or by transferring the document of title to the commodity. In the expression ‘otherwise than by actual delivery or by transfer of the commodity’ these two modes of delivery must be contemplated. Taking this expression alongwith the previous phrase ‘settled periodically or ultimately’, it would mean that in such a settlement of the contract, delivery of the commodity was never contemplated at all. In other words, speculative transactions are such that the parties never contemplate delivery of the commodity but only trade in the documents of title.

From the above discussion, it follows that where the nature of transaction entered into between the parties is such that under the contract the seller parts with the possession of the goods and while the goods were in transit

the buyer enters into subsequent transaction then so far as the first seller and the first buyers are concerned, there would be actual delivery of the goods as the first seller had parted with the possession of the goods and handed them over to the carrier which would amount to delivery to the buyer, the transaction cannot be regarded as a speculative transaction. If we are correct in our view on this, there would thus be transfer of commodity to the buyer in the instant case and the transaction would be out of the mischief of clause (5) of sec.43”.

Applying the above legal proposition to the facts of the present case, it is clear from the bye-laws of the stock exchange that it deals with only delivery based transactions and does not deal with the transfer of scripts by documents of title. Therefore, as a natural corollary, it is to be held that there is a constructive or implied delivery of the shares in the transactions in question. Therefore, it cannot be treated as a speculative transactions and the loss incurred thereon should be treated as a business loss and

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should be allowed the set off of other heads of income. Accordingly, the appeal filed by the assessee is allowed.

9. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on the 8th January, 2016.

Sd/-
(VIJAYPAL RAO)
JUDICIAL MEMBER

Place: Bangalore
D a t e d : 08-01-2016

am*

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A)-II Bangalore
- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

Sd/-
(INTURI RAMARAO)
ACCOUNTANT MEMBER

By order, AR,ITAT, Bangalore