

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F" NEW DELHI
BEFORE SHRI S.V. MEHROTRA : ACCOUNTANT MEMBER
AND
SHRI C.M. GARG: JUDICIAL MEMBER

ACIT, Circle 48(1),
New Delhi.
(Appellant)

ITA no. 3879/Del/2012
Asstt. Yr: 2008-09

Vs. Piyush Gupta,
8, Green Avenue, Abhey Khand II,
Indirapuram, Ghaziabad.
PAN: AATPG 5012 B
(Respondent)

Appellant by : Ms. Rakhi Bimal Sr. DR
Respondent by : Shri Gagan Kumar CA

Date of hearing : 10/05/2016.
Date of order : 13/05/2016.

ORDER

PER S.V. MEHROTRA, A.M:

This is revenue's appeal assailing the order dated 21.05.2012, passed by the Id. CIT(A)-XXX, New Delhi in appeal no. 2313/11-12, for A.Y. 2008-09.

2. Brief facts of the case are that the assessee had filed return of income declaring an income of Rs. 54,33,666/- on 2.3.2009. During the course of assessment proceedings the assessee filed a letter dated 20.12.2010, which is reproduced hereunder:

"The assessee has, during the assessment proceedings, discovered an error in his capital gain workings. In that the cost of shares of TV 18 was wrongly taken.

- a. 2229 shares of TV 18 acquired at 454 on May 5, 2007 were wrongly shown as acquired at Rs. 5/-.
- b. 6300 shares of TV 18 acquired @ Rs. 879/- were wrongly shown as acquired at Rs.36/-.

Please note that the second lot was allotted by the company after levy of FBT.

Consequently, as per the provisions of section 115WC(1)(Ba) and section 49(2AB) the cost of these was to be taken at Rs. 879/-. Evidence that the company has allotted these shares and levied FBT on it has been already filed. It is requested that the revised computations be used to finalize the assessment.

The assessee therefore in the process of filing his revised returns which you are requested to take note of.”

3. The AO did not accept the assessee’s contention, observing as under:

“The submission of the AR was duly considered. As per section 139(5) of Income Tax Act 1961-

"if any person, having furnished a return under sub-section (1), or in pursuance of a notice issued under sub-section (1) of section 142, discovers any omission or any wrong statement therein, he may furnish revised return at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier."

Accordingly as the time of filing the revised return has been over assessee request for filing revised return cannot be entertained. So assessee’s request to file revised return is hereby disallowed.

In the revised computation, it is noteworthy that according to revised computation the assessee has claimed a short term

capital loss of Rs. 332193.31/-. As per section 139(3) of Income Tax Act, 1961 -

*"if any person who 75[***] has sustained a loss in any previous year under the head "profits and gains of business or profession" or under the head "Capital gain" and claims that the loss or any part thereof should be carried forward under sub-section (1) of section 72, or sub-section (2) of section 73, or subsection (1) 76[or sub-section (3) of section 74, 77 [or sub-section (3) of section 74A], he may furnish, within the time allowed under sub-section (1) 78 [***], a return of loss in the prescribed form⁷⁹ and verified in the prescribed manner and containing such other particulars as may be prescribed, and all the provisions of this Act shall apply as if it were a return under sub-section (1)."*

Accordingly as the due date of filing the return u/s 139(1) has been over to claim this loss, this revised computation cannot be considered and cannot be allowed.

The assessee derives income from Salary, income from capital gains and income from other sources. In view of above after examining the details/documents filed by the assessee, the return income is accepted and assessed at Rs. 5433666/-."

4. The AO also passed order u/s 154 on 15.4.2011 adopting the same reasoning as in the assessment order.

5. From the contents of assessment order and the order passed u/s 154, it is evident that AO denied the assessee's claim under section 49(2AB) firstly because the time limit for filing the revised return had expired and as per the provisions of section 139(3) the loss could be carried forward only if the return of income was filed within the time allowed u/s 139(1).

6. Ld. CIT(A) allowed the assessee's appeal. Being aggrieved, the department is in appeal before us and has taken following grounds of appeal:

(i) Giving the directions to verify the loss of Rs.332193/- after verification of claim of the assessee in the same manner as done in the case of Mr. Bernard Vivian Fernandes, As the Ld. CIT(A) cannot give such kind of directions while passing his order.

(ii) Giving such directions ignoring the fact that assessee cannot claim the Short Term Capital Loss in question during the course of assessment proceedings, except by filing a revised return, which in the case of the assessee, he had not filed any revised return.

7. Brief facts, relevant to the controversy in hand, are that the assessee was granted shares under ESOP Scheme of his employer. In the relevant period, stock options were subject to fringe benefit tax as per section 115WB(1)(d). The company had paid FBT on the fair value of the shares and certificates to that effect had been filed with the AO during assessment proceedings. During the year assessee sold some of the shares making short term capital gains. As per the provisions of section 49(2AB) of the Act, the cost of these shares had to be taken at the fair value, but the assessee had wrongly taken the original cost while computing the capital gains. The assessee paid the tax due and filed his return on the basis of above computation i.e. without taking into consideration the effect of section 49(2AB).

8. Admittedly the original return was filed after the expiry of the time allowed u/s 139(1). In course of assessment proceedings, when this mistake was discovered, the assessee filed letter dated 20.12.2010, reproduced earlier.

9. Since the time for filing the revised return had elapsed, therefore, assessee could not revise the said return. The AO did not dispute the working of computation of capital gain by assessee but his only objection was that in view of the provisions of section 139(3), the assessee's claim could not be accepted.

10. The assessee filed application u/s 154 which was also rejected by the AO, citing the same reasons as given in the assessment order. The present proceedings are against the order passed u/s 154 by AO.

11. Ld. CIT(A), after considering the assessee's submissions allowed the assessee's appeal and gave certain directions to AO. Findings of Ld. CIT(A) are reproduced hereunder:

8. I have considered the assessment order, written Submission and grounds of appeal and discussed the matter with A.R. carefully. The AO had not given the benefit of short term capital loss on Rs. 3,32,193 which has been mentioned in the order u/s 143(3) of the Act dated 22/12/2012. The A.O. did not allow assessee the revised computation benefit, as original return was not filed in time and no revised return also filed. The AO had refused to consider & substitute the cost of ESOPs, (as prescribed u/s 49(2AB) the purpose of Capital Gain computation). The AO did not take cognizance of the Revised Computations filed on the basis of the Cost of ESOPs u/s 49(2AB), as the original return was filed delayed. No revised return was filed. On the same grounds the AO rejected the application u/s 154 of the Act.

However, the AO in the case of Sh. Bernard Vivian Fernandes (a colleague of appellant) had allowed the said assessee to

compute Capital Gain on the basis of cost as determined u/s 49(2AB).

Since the original return was filed delayed, the assessee is not entitled to carry forward losses but is entitled to a correct computation of capital Gains in the current year - this is the plea of AR.

The Delhi High Court has also held in the case of CIT, Vs Bharat Alluminium (2007) 163 Taxman 430, that filing a revised Computation during assessment proceedings does not tantamount to a revised return & is to be respected.

The ITAT Pune Bench in the matter of DCIT v. Lab India Instruments (2005) 93 ITD 120 has also held that claim of a deduction of exemption made during assessment proceedings is admissible.

The AO has not agreed to substitution of the Cost of ESOPs prescribed u/s 49(2AB), which refers to the fair market Value of ESOP. The GRANTOR Company has already paid FBT on the said Esop for which certificates have been placed on record.

Piyush				
Capital Gain Computation for financial Year 2007-08				
	ORIGINAL		REVISED	
	LONG TERM	SHORT TERM	LONG TERM	SHORT TERM
Sale proceeds	516359	7341752	516359	7341752
Cost	0	3193617.23	0	7673951
Profit	516359	4148134.77	516359	-332199

Note: STCG is converted to a STCL because of substitution of cost.

Rejected 154 application filed by the appellant on same ground as in 143(3), however the AO allowed in case of Sh. Bernard Vivian Fernandes colleague of the appellant on same date u/s 143(3). Therefore the action on the AO is not justified in disallowance of 3,32,193. The AO is directed to verify the facts and allow after verification of the claim of appellant in the same manner as was done in case of Bernard Vivian Fernandes. The AR should cooperate with AO in giving necessary information to him.

12. We have considered the submissions of both the parties and have perused the record of the case. d. counsel for the assessee pointed out that the provisions of section 139(3) do not come into play in the present proceedings because assessee was not claiming any carry forward of losses. The assessee only in course of assessment proceedings brought to the notice of the AO that the petition made by him was not in accordance with law in- as-much as the effect of section 49(2AB) had not been taken into consideration while computing the short term capital gain. Admittedly, as per section 49(2AB), the assessee was required to take fair market value of ESOP while computing the short term capital gains. It is well settled law that if a statutory provision has not been given effect to while computing income, then it amounts to a mistake apparent on the face of record, rectifiable u/s 154. In this regard ld. counsel has referred to following decisions:

- M.K. Venkatachalm v. Bombay Dyeing & Manufacturing Co. Ltd. (1958) 34 ITR 143 (SC);
- Income-tax Officer vs. Asok Textiles Ltd. (1961) 41 ITR 732 (SC);
- and
- CIT Vs. Kesaria Tea Co. Ltd. (1998) 233 ITR 700 (Kerala).

12.1. Ld. counsel has also referred to CBDT Circular no. 14(XL-35), wherein it has been, inter alia, observed as under:

“(3) Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessee on whom it is imposed by law, officers should

(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;

(b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs.”

12.2. Ld. DR's contention is that since assessee had not claimed the fair market value of shares in the original computation of income, then there was nothing on record which could be rectified. We are not convinced with this argument of ld. DR because assessee had computed capital gains arising out of sale of ESOP's.

12.3. In the facts and circumstances of the case, it cannot be said to be a fresh claim advanced by assessee in course of assessment proceedings which could have warranted filing a revised return. We fail to understand as to why the same AO who allowed identical claim on the same date in case of Mr.

Bernard Vivian Fernandes colleague of the assessee, denied the same claim in assessee's case. Under such circumstances, ld. CIT(A) was justified in directing the AO to verify the facts and allow, after verification, the claim of assessee in same manner as was done in the case of Bernard Vivian Fernandes. In view of above discussion, we do not find any infirmity in the order of ld. CIT(A) and the same is upheld.

13. In the result, Revenue's appeal is dismissed.

Order pronouncement in open court on 13/05/2016.

Sd/-
(C.M. GARG)
JUDICIAL MEMBER
Dated: 13/05/2016.

Sd/-
(S.V. MEHROTRA)
ACCOUNTANT MEMBER

MP

Copy of order to:

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.