

**IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA**

**BEFORE SHRI A. T. VARKEY, JM & DR. A.L. SAINI, AM**

**आयकरअपीलसं./ITA No.2265/Kol/2014**

**निर्धारणवर्ष / Assessment Year: 2008-09**

<b>Shri Kishan Saraf</b> Krishna Building, Room No.817, 224, A.J.C. Bose Road, Kolkata – 700 020.	<b>Vs.</b>	<b>A.C.I.T, Cir-45, Kolkata.</b> Govt. Place(West), Kolkata – 700 001.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AKUPS4979 C		
<b>(ASSEESSEE)</b>	<b>..</b>	<b>(REVENUE)</b>

**&**

**आयकरअपीलसं./ITA No.27/Kol/2015**

**निर्धारणवर्ष / Assessment Year: 2008-09**

<b>A.C.I.T, Cir-45, Kolkata.</b> Govt. Place(West), Kolkata – 700 001.	<b>Vs.</b>	<b>Shri Kishan Saraf</b> Krishna Building, Room No.817, 224, A.J.C. Bose Road, Kolkata – 700 020.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AKUPS 4979 C		
<b>(REVENUE)</b>	<b>..</b>	<b>(ASSEESSEE)</b>

Assessee by

: Shri S.D Varma, Adv.

Revenue by

: Shri Saurabh Kumar, ACIT, DR

सुनवाईकीतारीख/ **Date of Hearing**

**: 05/09/2017**

घोषणाकीतारीख/**Date of Pronouncement**

**: 04/12/2017**

**आदेश / O R D E R**

**Per Dr. Arjun Lal Saini, AM:**

The captioned cross-appeal filed by the Assessee and Revenue, pertaining to Assessment Year 2008-09, are directed against an order passed by the Id. Commissioner of Income Tax (Appeals)-XXX, Kolkata in Appeal No.238/CIT(A)-XXX/Cir-45/2013-14, dated 29.10.2014, which in turn arises out of an order passed

by the Assessing Officer under section 143(3)/263/143(3) of the Income Tax Act, 1961, (hereinafter referred to as the 'Act'), dated 31.01.2014.

2. Since these two cross-appeals relate to same assessee, same Assessment Year, identical issues involved, therefore, these have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

3. The grounds of appeal raised by the assessee in ITA no.2265/Kol/2014, are as follows:

*"1.That the Id. Commissioner of Income Tax(Appeal)-XXX has erred in law and in facts in treating a sum of Rs.380455/- as business income which in fact and law is part of short term capital gain of Rs.6094446/- derived by the assessee during previous year relevant to Assessment Year 2008-09. (para1 at page 10 of appeal order).*

*2.That the Id. CIT(A)-XXX was not justified in treating short term capital gain of Rs.380445/- (which arose for holding period varying from 3 days to 90 days as business income, ignoring the facts and assessment records of the assessee.*

*3.The assessee craves leave to add/alter/modify any other grounds of appeal at the hearing stage."*

4. The grounds of appeal raised by the Revenue in ITA No.27/Kol/2015, reads as under:

*"1.For that, the Ld. CIT(A)-XXX, Kolkata has erred in law and on facts by holding that Rs.3,80,455/- (out of total Rs.60,94,446/-) is to be assessed as business income and the balance Rs.57,13,991/- is to be assessed as Short Term Capital Gain.*

*2.For that, the Ld. CIT(A)-XXX, Kolkata has erred in law and on facts in holding that income arising out of sale of shares held up to 90 days or less is to be taxed as business income and the income arising out of sale of shares held for more than 90 days is to be taxed as capital gains.*

*3.For that, the Ld. CIT(A)-XXX, Kolkata has erred in law and in facts in deleting the addition of Rs.2,09,691/- made u/s 40(a)(ia) of the Act for non-deduction TDS against payment of interest on loan.*

4. For that, the Ld. CIT(A)-XXX, Kolkata has erred in law & facts in deleting the addition of Rs.2,71,000/- made on account of low drawing by the assessee without considering the relevant facts of the case.

5. For that the assessee craves the leave to add, alter, modify, include or delete any ground of appeal.”

**5. Ground No. 1 and 2 raised by the assessee in ITA No. 2265/kol/14 are identical with ground No.1 and 2 raised by the Revenue in ITA No.27/kol/15 therefore these are being adjudicated together. The main grievance of the assessee in these grounds is that amount of Rs.3,80,455/- was not a business income and it was part of short term capital gain of Rs.60,94,446/-**

6.The brief facts qua the issue are that the assessee filed its Return of income for the assessment year 2008-09 declaring a total income of Rs. 68,02,415/- and the same was assessed u/s 143(3) of the Income Tax Act, 1961 on 02.11.2010 with assessed income of Rs.68,92,560/-. Subsequently, the Id. CIT(A) had exercised its jurisdiction u/s 263 of the I. T Act stating that the order u/s 143(3) was erroneous in so far as it was prejudicial to the interest of revenue on the ground that the A.O. failed to examine the records properly. The gist of the findings of the order u/s 263 passed by the Ld. C.I.T-XV, Kol, dated 15.03.2013 is as under:

- i) Failure to verify trading results and whether the gain on the sale of shares and securities is business profit or short term capital gain.
- ii) Failure to apply provisions of sec. 2(22)(e) of I.T. Act on loan from M/s Acknit Knitting Ltd. in which assessee has substantial interest.
- iii) Failure to invoke provision of sec. 40(a)(ia) on non-deduction of tax at source on the interest paid.
- iv) Failure to verify the loan given to wife and its consequences in view of sec. 64(1)(iv) of IT. Act.
- v) Failure to verify household expenses.

Therefore, the Id. CIT(A) exercising the power U/s 263, had set aside the order dated 02.11.2010 only to the extent indicated in the foregoing paragraphs and directed the Assessing Officer to pass a fresh assessment order. During the assessment proceedings, the Assessing Officer noted that since more than 85% of the gross total income shown by the assessee consisted of income related to share, the nature of transactions that gave rise to the short term capital gain(STCG) were sought to be examined vis-a-vis the various factors involved to determine whether they are actually in the nature of investments. Considering the volume of shares dealt with, the Assessing Officer led to the conclusion that purchase and sale of shares by the assessee constituted an activity in the nature of business. Therefore, the Assessing Officer asked the assessee that income from the purchase and sale of shares should be considered in the nature of business or trade as against the claim of investment. During the assessment proceedings, the assessee submitted that during the relevant assessment year short-term capital gain of Rs.60,94,446 was arised on purchase and sale of reputed blue chip companies shares including Govt. and semi-govt. companies. The purchase and sale of share were not the business of the assessee but to invest surplus money into capital market. The gain was arised due to the rarest opportunity, an unimagined movement in the capital market. Therefore, assessee submitted that investment in shares and securities is merely an investment and not a business of the assessee. However, the Assessing Officer rejected the claim of the assessee and treated the assessee as a trader.

7. Aggrieved by the order of the Assessing Officer, the assessee filed an appeal before the Id. CIT(A) who has allowed the assessee's appeal partly. During the appellate proceedings, the Id. CIT(A) noted that assessee earned income of Rs.3,80,455/- on shares sold after holding period varying from 3 days to 90 days.

Therefore, this amount of gain of Rs.3,80,455/- was treated as business income and CIT(A) directed the AO to treat the amount of Rs.3,80,455/- as business income. As regards the rest amount of short term capital gain of Rs.57,13,991/- (60,94,446 – 3,80,455), the same was decided to be treated as short term capital gain.

8. Not being satisfied with the order of the Id. CIT(A), the assessee is in further appeal before us in respect of income of Rs.3,80,455/-. The Id. Counsel submitted that the assessee earned income of Rs.3,80,455/- in respect of shares sold after holding period varying from 3 days to 90 days. Therefore, this amount of gain of Rs.3,80,455/- is to be treated as a part of the short-term capital gain. That is, the Id. Counsel pointed out that the income of Rs.3,80,455/- was part of Rs.60,94,446/- and therefore, it should be treated as a short-term capital gain.

The Ld. Counsel for the assessee had also pointed out that from Assessment Year 2005-06 to 2007-08, the assessments had been completed U/s 143(3)/ 143(1) of the Act, and the Department had been accepting the said account of income as short-term capital gain,(vide P.B 32).

9. On the other hand, the Ld. DR for the revenue has primarily reiterated the stand taken by the AO, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

10. Having heard the rival submissions, perused the materials available on record, we are of the view that in assessee's case under consideration, the Department had been accepting the same account of income as short-term capital gain in assessment years 2005-06 to 2007-08. We note that the Department has been consistently accepting the assessee as an Investor and not a trader, in past assessment years therefore, we do not uphold the order of the Id. CIT(A), following the Rule of consistency. The revenue should follow the consistency in taxing a particular income of the assessee. For that we rely on the judgment of the Hon'ble

Supreme Court in RadhasoamiSatsang vs. CIT 193 ITR 321 (SC). So, we do not uphold the order of the Id. CIT(A) and we direct the CIT(A) to treat the assessee as an investor.

Therefore, we allow the ground No. 1 and 2 raised by the Assessee in ITA No.2265/kol/14 and we dismiss the ground No. 1 and 2 raised by the Revenue in ITA No.27/kol/2015.

**11. In the result, appeal filed by the assessee( Ground No.1 and 2 in ITA No.2265/kol/14) are allowed, whereas appeal filed by the Revenue ( Ground No.1 and 2 in ITA No.27/Kol/2015) are dismissed.**

**12. GroundNo.3 raised by the Revenue relates to addition of Rs.2,09,691/- made u/s 40(a)(ia) of the Act for non-deduction of TDS against payment of interest on loan.**

13 The brief facts qua the issue are that this ground of revenue relates to disallowance of interest paid to Upkar Distributors P. Ltd. of Rs.87,508/- and Sarada Trade Fin P. Ltd. of Rs.1,22,183/- u/s.40(a)(ia) of the I.T. Act. The assessee had debited in his income/Expenditure A/c Rs.87,508/- and Rs.1,22,183/- under the head interest on loan to Upkar Distribution Pvt. Ltd. and Sarada Trade Fin Pvt. Ltd, however no tax was deducted on source on the amount paid as interest.

The AO noted that the said expenditures were indeed debited in his income/Expenditure a/c. Further, it was also established fact that the assessee had business income in excess of the limit stated in the sec,44AB of the Act. Therefore, the interest paid on loan was liable to be deducted tax at source as per proviso of sec. 194A. Failure to deduct tax at source invokes the proviso of sec. 194A and the provisions of sec. 40(a)(ia) of the Act, therefore AO disallowed such expenses of Rs.2,06,691/- added back to the income of the assessee.

14.The counsel for the assessee submitted before us that section, 44AB is not applicable, because the assessee has always acted as Investor in shares, This fact was established with reference to past assessment records and activities of the

assessee. As such provisions of Sec. 194A is not applicable therefore disallowance u/s.40(a)(ia) for Rs.209691/- is unjustified. The Id DR for the Revenue did not controvert the submissions of the Id Counsel for the assessee.

15. Having heard the rival submissions and perused the material available of record, we note that the computation of income contained in the return of income does not show any income under the head "Business or Profession". The Assessee has not claimed deduction of interest. So there is no question of making addition. The borrowings were not utilized in acquisition of shares. As the transactions of shares have mostly been treated as done on investment account, therefore, there is no basis for addition of interest u/s.40(a)(ia) and hence we confirm the order passed by CIT(A).

16 In the result, the appeal filed by the Revenue on this issue is dismissed.

**17. Ground No.4 raised by the Revenue relates to addition of Rs.2,71,000/- made on account of low drawing by the assessee.**

18. The brief facts qua the issue are that assessing officer made the addition on account of low drawings. The assessee submitted that considering the total drawing of all the family members namely himself, Kusum Saraf-wife, Abhishek Saraf, son and Aditya Saraf-son, besides L.I.C., Income Tax, Mediclaim etc. only for household expense amounting to Rs.5.57 lakh were as per their standard of living. The AO noted that no documentary evidence had been produced as to what were the drawings of other members of the family. A mere statement will not hold good. The Counsel submitted that during the year under consideration the assessee had drawn a sum of Rs,281000/- for drawing and his other family members had following withdrawals.

i) Smt. Kusum Saraf-Wife	Rs.84000.00
ii) Abhishek Saraf-Son	Rs.98958.00
iii) Aditya Saraf-Son	Rs.96000.00
Total =	Rs.278958.00

Thus the total drawing comes to Rs.5,59,958/- It was explained to A.O. that total withdrawal by assessee and by other family members is sufficient to cover household expenses. All family members are assessed to Income Tax. Since all members

are staying in a joint family, the total amount of contribution by all members towards drawing should be considered as fair.

We have heard both the parties and perused the material available on record, we note that the A.O. has not brought on record unusually high level of standard of living, if any. In the family of 4-5 persons drawing aggregating to Rs.5,59,958/- appears reasonable on the facts on record. Therefore, considering the factual position, we do not find any infirmity in the order passed by the CIT(A), therefore, we confirm the order passed by the CIT(A).

19 In the result, appeal filed by the Revenue, on this issue, is dismissed.

Order pronounced in the open court on this **04/12/2017**.

**Sd/-**  
**(A. T. VARKEY)**

न्यायिक सदस्य / JUDICIAL MEMBER  
कोलकाता /Kolkata; दिनांक Dated 04/12/2017  
RS(SPS)

**Sd/-**  
**(DR. A.L.SAINI)**

लेखा सदस्य / ACCOUNTANT MEMBER

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. The Assessee– Shri Kishan Saraf
2. The Revenue/Department -A.C.I.T, Cir-45, Kolkata.
3. आयकरआयुक्त(अपील) / The CIT(A), Kolkata.
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.  
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By Order

Senior Private Secretary,  
Head of Office/D.D.O,  
I.T.A.T, Kolkata Benches,  
Kolkata.