

आयकर अपीलीय अधिकरण “एक-सदस्य मामला” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH, MUMBAI

श्री शमीम याहया, लेखा सदस्य के समक्ष ।

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 4715/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2005-06)

K Jayantilal Securities Pvt. Ltd. 2 nd Floor, PS 4, Rotunda Building Dalal Street, Mumbai – 400 001	बनाम/ Vs.	Jt. CIT (OSD), Circle 4(3), Room No. 649, Aaykar Bhavan, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACK 4621 Q		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Shri Sanjay C. Shah
प्रत्यर्थी की ओर से/Respondent by	:	Ms. N. Hemalatha
सुनवाई की तारीख / Date of Hearing	:	16.11.2017
घोषणा की तारीख / Date of Pronouncement	:	05.02.2018

आदेश / ORDER

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order by the Commissioner of Income Tax (Appeals) dated 05.05.2017 and pertains to the assessment year 2005-06.

2. The grounds of appeal read as under:

Learned Id. Commissioner of Income Tax (Appeals) erred in confirming the order of Learned Assessing Officer in levying Income Tax @ 30% on Short Term Capital Gains on sale of shares of Rs.3,47,979/- as against 10% u/s. 111A of the Act as claimed by the Appellant.

3. In this case, the assessing officer passed an order u/s.154 of the IT Act as under:

Rectification of mistake.

154. (1) With a view to rectifying any mistake apparent from the record an income-tax authority referred to in section 116 may,—

- (a) amend any order passed by it under the provisions of this Act ;
- (b) amend any intimation or deemed intimation under sub-section (1) of section 143;
- (c) amend any intimation under sub-section (1) of section 200A;
- (d) amend any intimation under sub-section (1) of section 206CB.

(1A) Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in sub-section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided.

(2) Subject to the other provisions of this section, the authority concerned—

- (a) may make an amendment under sub-section (1) of its own motion, and
- (b) shall make such amendment for rectifying any such mistake which has been brought to its notice by the assessee or by the deductor or by the collector, and where the authority concerned is the Commissioner (Appeals), by the Assessing Officer also.

(3) An amendment, which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee or the deductor or the collector], shall not be made under this section unless the authority concerned has given notice to the assessee or the deductor or the collector of its intention so to do and has allowed the assessee or the deductor or the collector a reasonable opportunity of being heard.

(4) Where an amendment is made under this section, an order shall be passed in writing by the income-tax authority concerned.

(5) Where any such amendment has the effect of reducing the assessment or otherwise reducing the liability of the assessee or the deductor or the collector, the Assessing Officer shall make any refund which may be due to such assessee or the deductor or the collector.

(6) Where any such amendment has the effect of enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee or the deductor or the collector, the Assessing Officer shall serve on the assessee or the deductor or the collector, as the case may be a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under section 156 and the provisions of this Act shall apply accordingly.

(7) Save as otherwise provided in section 155 or sub-section (4) of section 186 no amendment under this section shall be made after the expiry of four years from the end of the financial year in which the ordersought to be amended was passed.

(8) Without prejudice to the provisions of sub-section (7), where an application for amendment under this section is made by the assessee or by the deductor or by the collector] on or after the 1st day of June, 2001 to an income-tax authority referred to in sub-section (1), the authority shall pass an order, within a period of six months from the end of the month in which the application is received by it,—

- (a) making the amendment; or
- (b) refusing to allow the claim.

4. Before the learned CIT-A, the assessee submitted as under:

1. “The learned Jt. Ld. Commissioner of Income Tax (OSD)-4(3), Mumbai, has erred in passing order u/s. 154 of the Income Tax Act, 1961 levying tax @ 30% on Short Term Capital Gain of Rs.3,47,979/- instead of levying tax @ 10% u/s. 111A.

The facts of the case are as follows:

The Profit & Loss account for the year ended 31st March, 2005 of the appellant shows an amount of Rs.3,47,979/- under the head capital gains. A copy of the annual accounts is attached herewith for your ready reference.

The computation of income of the appellant for A.Y. 2005-06 shows the entire amount of capital gains of Rs.3,47,979/- under the head Short Term Capital Gains u/s. 111A and tax has been paid @ 10% accordingly. A copy of the computation of income is attached herewith for your ready reference.

Section 111A of the Income Tax Act, 1961 states that securities transaction tax has been charged on sale of equity shares in a company, then short term capital gains thereon will be charged to tax @ 10%.

Securities Transaction Tax came into effect from 1st October, 2004.

Paragraph 1 of the Order u/s. 154 of the Income Tax Act, 1961 states that “It has seen from the perusal of the record that the assessee paid taxes u/s. 111 of the I T Act on the Short Term Capital Gain. Section 111 of the IT Act is applicable only when STT has been paid. From the details filed determining disallowance u/s.94(7) during the course of assessment reveals that entire sales were in the month of September, 2004. Therefore, the STCG should have been levied at 30% instead of 10%.”

It is respectfully submitted that the entire capital gain of Rs.3,47,979/- shown under the head Short Term Capital Gains u/s. 111A by the appellant are out of shares sold after October 2004 and STT has been paid on the entire amount of sale of shares.

A copy of the capital gains calculation sheet along with all the corresponding contracts for sale of shares is attached herewith for your ready reference.

From the contracts for sale of shares it can be seen that all sales are after 1st October, 2004 and securities transaction tax has been charged on all the transactions for sale of shares.

In view of the above, and taking the facts and circumstances of the case into consideration, the tax levied @ 30% be deleted and the short term capital gains u/s. 111A be taxed @ 10%.

5. Considering the above, the Id. Commissioner of Income Tax (Appeals) reproduced the assessing officer's order u/s. 154 and dismissed the assessee's plea by observing as under:

It is found that during 154/155 proceedings, the assessee did not file any reply with the A.O. Therefore, after verification of record for A.Y. 2005-06, the A.O. proceeded to rectify the previous order of 143(3). The appellant has not made any application for filing any additional evidence under rule 46A of the I. T. Rule 1962. Therefore, keeping in view of the facts narrated by the A.O. in the order u/s. 154, the stand of the A.O. is upheld.

6. Against this order, the assessee is in appeal before the ITAT.
7. I have heard both the counsel and perused the records. It is clear that assessee has submitted before the Id. Commissioner of Income Tax (Appeals) that the assessee

has actually paid the STT and the sale transaction took place after 1st October, 2004. However, the learned CIT-A has not at all considered this submission and has held that assessee has not filed any additional evidence. What sort of additional evidence learned CIT-A had in mind has not been spelt out. Assessee has made factual submission and these could have been verified from the assessment records. Hence in my considered opinion the non-consideration of assessee's submission and laconic dismissal of the plea by the learned CIT-A is not sustainable. Accordingly, I remit the issue the file of learned CIT-A. Learned CIT-A is directed to consider the issue afresh keeping into account our observations as above and after giving the assessee proper opportunity of being heard.

8. The assessee has raised additional ground and made the following submissions:

Learned Assessing Officer erred in passing order u/s 154 of the Act which is bad in law.

Appellant submits that the said order is bad in law and deserves to be quashed.

The order passed u/s 154 of the Act is bad in law for the following reasons:-

1. Statutory Notice u/s 154(3) dated:-10th Aug 2009 (copy enclosed) cannot be said to be Notice u/s 154(3) of the Act as there is no mention about particulars of mistake proposed to be rectified. Hence the said notice is bad in law.

2. On 30th Mar 2012, Appellant again received a notice u/s 154 of the Act dated NIL (copy enclosed) from the office of DCIT (OSD) 4(3) asking appellant to appear in person on 26th Mar 2012.

Order passed u/s 154 is dated 26th March 2012 (copy enclosed) which is before the date of service of notice.

In other words, notice was received after the date of appointment specified in the notice making the notice infructuous and bad in law.

3. The issue rectified by passing an Order u/s 154 of the Act required examination of fresh material which is not permitted for passing an order u/s

154 of the Act as the said Order can be passed only from material available on record.

Additional Grounds No. 2 raised by Appellant are in the nature of Question of law, which are arising from the facts which are already on record, and no new facts are adduced in support of additional grounds of Appeal.

No fresh facts are required for determination of issue involved in the additional grounds of appeal. In other words, Additional Ground of appeal is purely in the nature of legal issue.

Above additional Grounds of appeal could not be raised before the Learned CIT (Appeals) through oversight.

As per Established legal position, Additional Grounds of Appeal on legal issues going to the root of the matter and requiring no further factual investigations are admissible in Appeal.

Appellant relies on following judicial pronouncements:-

1. Commissioner of Income Tax vs. Sinhgad Technical Education Society (2017) 297 CTR (SC) 441
2. National Thermal Power Co Ltd vs CIT (1999) 157 CTR (SC) 249
3. CIT vs. Honda Siel Power Products Ltd. (2008) 169 Taxman 40 (Del)
4. SAT Narain vs ITO (2005) 94 TTJ (Del) 499
5. Kanoi Industries (P) Ltd. Vs. DCIT (2006) 102 TTJ (Kol) 285
6. Ashwani Kumar vs. ACIT (2007) 110 TTJ (Asr) 890
7. DCIT vs. Ruchira Papers Ltd. (2007) 110 TTJ (Chd) 995
8. Abhishek Industries Ltd. Vs. CIT (2007) 290 ITR 655 (P&H)
9. Jasbeer Kaur Bhatia vs. Assistant Commissioner of Gift Tax (2007) 111 TTJ (Chd) 180

9. Upon careful consideration and hearing both the counsel I find that the additional ground deserves to be admitted. Since it requires reference to factual records also and it was not raised before the ld. Commissioner of Income Tax (Appeals), I deem it appropriate to remit the additional ground raised also to the file of learned CIT-A. the ld. Commissioner of Income Tax (Appeals) is directed to consider this issue after giving the assessee proper opportunity of being heard.

10. In the result, this appeal by the assessee stands allowed for statistical purposes.

Order pronounced in the open court on 05.02.2018

Sd/-

(Shamim Yahya)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 05.02.2018

व.नि.स./Roshani, Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai