

आयकर अपीलीय अधिकरण] पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI ANIL CHATURVEDI, AM
AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं / ITA No.357/PUN/2016

निर्धारण वर्ष / Assessment Year : 2006-07

Dy.Commissioner of Income-Tax,
Central Circle 1(2), Pune.

..... अपीलार्थी /
Appellant

बनाम v/s

Finolex Industries Limited,
D-10, MIDC, Chinchwad,
Pune – 19.

..... प्रत्यर्थी /
Respondent

PAN : AAACF2634A.

Assessee by : Shri C.H. Naniwadekar.

Revenue by : Shri Rajeev Kumar, CIT.

सुनवाई की तारीख / Date of Hearing : 05.02.2018	घोषणा की तारीख / Date of Pronouncement: 09.02.2018
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आदेश / ORDER

PER ANIL CHATURVEDI, AM :

1. This appeal filed by the Revenue u/s 253 of the Income Tax Act is emanating out of the order of Commissioner of Income Tax (A) - Pune – 11 dt.21.12.2015 for the assessment year 2006-07.

2. The relevant facts as culled out from the material on record are as under :-

2.1 Assessee is a company engaged in the business of manufacturing and sale of PVC Resin, PVC Pipes etc. A search and seizure action was carried out on 18.11.2010 in the Finolex

group of companies. Consequently, notice u/s 153A of the Act was issued on 22.08.2012 and in compliance to which assessee furnished return of income on 10.08.2011 disclosing total income of Rs.66,38,77,799/-. Thereafter, assessment was framed u/s 143(3) r.w.s. 153A of the Act vide order dt.28.03.2013 and the total taxable income was determined at Rs.67,55,19,067/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who vide order dt.21.12.2015 (in appeal No.Pn/CIT(A)-11/DCIT, Cen. Cir.1(2), Pune/407/2014-15) decided the issue in favour of the assessee. Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us and has raised the following grounds :

“1) On the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in accepting the plea of the assessee that "Mutual Funds" is not a trading investment whereas no such distinction has been provided in the Act to ascertain whether any activity is a "Business" as per Sec. 2(13) of the Income Tax Act, 1961.

2) On the facts and the circumstances of the case and in law, although the Ld. CIT(A) has held that issues, which have been concluded during proceedings u/s 143(3) cannot be revisited u/s. 153A of the Income Tax Act, 1961 based on the decision of the Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (374 ITR 64 5) and Murali Agro Products (49 Taxmann. com.172), when these decisions have not reached finality and have been admitted in SLP by the Hon'ble Supreme Court.

3) On the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in overlooking the Non-obstante nature of Section 153A, which treats the return filed or relied upon by the assessee as a fresh return and in consequence the Assessing Officer was well within his rights to assume jurisdiction over the said filed or relied upon return u/s.143(2) of the Income Tax Act,1961 notwithstanding the fact that an order u/s. 143(3) had been passed in respect of the original return.

4) The order of the Ld. CIT(A) may be vacated and the Assessing Officer be restored.

5) The appellant craves leave to add, alter amend and modify any of the above grounds of appeal.”

3. Before us, at the outset, Ld.D.R. submitted that though Revenue has raised various grounds but all the grounds are interconnected and can be considered together.

4. AO noticed that assessee had offered short term capital gains of Rs.19,95,85,093/-, out of which on the amount of capital gains of Rs.5,29,56,697/-, assessee had paid tax at 10% u/s 111A of the Act. The assessee was asked to show cause as to why the income not be treated as business income and taxed at 30%. The submission of the assessee was not found acceptable to the AO. AO noticed that assessee company has done substantial investments in units of Mutual Funds and had entered into more than 200 transactions. AO therefore concluded that the intention of the assessee was to trade with a view to earn profits rather than to keep it as investments. AO held the transactions of purchase and sale of mutual funds entered into by the assessee to be adventure in the nature of trade and therefore the submission that the profit should be considered as short term capital gain was not acceptable. AO accordingly held that the profits earned of Rs.5,29,56,697/- as income from “business and profession” as against the claim of assessee of “short term capital gains.” Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who decided the issue in favour of the assessee by holding as under :

“7.2 have considered the facts of the case and the appellant's submissions. The short term capital gains in question were accepted as such in the original asst order by the AO. There is no mention in the present asst order that any new facts in this regard had come to light as a result of the search or during the reassessment proceedings.

7.3 The appellant explained to the AO that there are about 10 transactions of investment in the units of the mutual funds and redemption of the same, Investment in units of mutual funds is generally not a trading investment because the units of mutual funds can only be redeemed. It was also stated that on an average there was holding period of more than 30 days for such transactions, It was also explained that the investment was out of- the surplus funds of the company and was akin to parking of the surplus funds in FDs etc. The appellant also relied on various court decisions in this regard before the AO. The AO however brushed aside all these arguments and facts as explained by the appellant without accepting or rejecting any of the contention directly. The AO accepted the claim of the assessee with respect to investment in Debt Oriented MFs etc but refused the same with respect to investment in Equity Oriented Funds that also only 9 M Fs which resulted into short term gain of 5.29 crs. It is also seen that in some of the future asst years the AO has accepted the appellant's claim of short term gains. The AO thus has made the addition in this year because in his opinion the transactions looked like a business transaction and not investment.

7.4 Thus, it is a clear case of change of opinion by the AO about the issue without any change in the law or the facts of the case. This type of review of any issue concluded in an earlier scrutiny assessment is not permissible in the reassessment to be framed under section 153A of the Act. The law in this regard has been laid down very clearly by the jurisdictional High Court in the case of Continental Warehousing Corporation (374 ITR 645) and Murali Agro Products (49 taxmann.com 172). The ground of appeal is therefore allowed and the AO is directed to not to tax the short term capital gains as business income.”

Aggrieved by the order of Ld.CIT(A), Revenue is now in appeal before us.

5. Before us, Ld.D.R. supported the order of AO. Ld.A.R. on the other hand, reiterated the submissions made before AO and Ld.CIT(A) and further submitted that similar transactions of profits offered by the assessee as capital gains in earlier years and

subsequent years have not been disputed by the Revenue. He further submitted that no incriminating material was found during the course of search and therefore the Ld.CIT(A) has rightly following the decision of Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (374 ITR 645), had decided the issue in favour of the assessee. He therefore submitted that in view of the aforesaid facts, no interference to the order of Ld.CIT(A) is called for.

6. We have heard the rival submissions and perused the material on record. The issue in the present case is with respect to the taxability of capital gains earned on sale of mutual funds. Assessee had offered the gain as short term capital gain whereas in the assessment proceedings u/s 153A of the Act, AO held it as business income. We find that Ld.CIT(A) while deciding the issue noted that while passing the original assessment order, the short term capital gains offered by the assessee was accepted and that no new facts with respect to the short term capital gains had come to light as a result of search. He has also noted that AO accepted the claim of assessee of short term capital gains in respect of profits of 'debt oriented mutual funds' but refused the contention of assessee with respect to profits earned from 'equity oriented mutual funds' and therefore it was a case of change of opinion without any change in law and the facts of the case. The aforesaid finding of Ld.CIT(A) has not been controverted by Revenue. Before us, Revenue has neither placed any contrary binding decisions in its support nor pointed out any fallacy in the findings of Ld.CIT(A).

In view of the aforesaid facts, we find no reason to interfere with the order of Ld.CIT(A). **Thus, the grounds of the Revenue are dismissed.**

7. In the result, the appeal of Revenue is dismissed.

Order pronounced on 9th day of February, 2018.

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(ANIL CHATURVEDI)

लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 9th February, 2018.

Yamini

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A), Pune-11, Pune.
4. Pr.CIT, (Central), Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" / DR, ITAT, "A" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.