



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

BEFORE SHRI R.C.SHARMA, AM

&

SHRI SANDEEP GOSAIN, JM

ITA No.7291/Mum/2016

(Assessment Year :2012-13)

ACIT – 26(1) R.No.701C-11 7 th Floor, BKC Bandra (E) Mumbai – 400 051	Vs.	Shri Hitesh S.Doshi A-1602, Eternia, Hiranandani Gardens Powai, Mumbai - 76
PAN/GIR No.		AACPD8612R
Appellant)	..	Respondent)

Revenue by	Shri M.C.Omi Ningshen
Revenue by	Shri Deepak Shah
Date of Hearing	17/04/2018
Date of Pronouncement	20/04/2018

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the Revenue against the order of CIT(A) – 38, Mumbai dated 20/09/2016 for A.Y.2012-13 in the matter of order passed u/s.143(3) of the IT Act.

2. In this appeal, Revenue is basically aggrieved for treating the income declared on sale of shares as capital gain instead of business income as held by the AO.

3. Precise observation of CIT(A) was as under:-

“4.1 The first ground of appeal is that the income of the appellant at Rs. 1,61,25,492 may be treated as Short Term Capital Gain as against business income treated by the AO.

4.2 The fact remains that the AO considered the income earned in dealing with the shares as business income of the appellant as against the STCG claimed by the appellant in his return of income by considering the aspects of number of transactions/volume of transactions, period of holding of shares, etc. and has arrived at that the appellant is a trader into the shares and not an investor.

4.3 The facts of the case has been examined and it is observed that as per CBDT Circular No.4/2007 dated 15/06/2007, no single principle would be decisive and the total effect of all the principles should be considered to determine the nature of activity- whether it is business income or Capital Gains. As per Para 10 of the above circular of the CBDT, it has been mentioned that it is possible for a tax payer to have two portfolios, i.e., an investment portfolio comprising of securities which are to be treated as capital assets and a trading portfolio comprising of stock-in-trade which are to be treated as trading assets. Where an appellant has two portfolios, the appellant may have income under both heads i.e., capital gains as well as business income.

4.4 In the light of the above, it is observed that the appellant has consistently been following the practice of holding some shares as stock- in- trade and other shares as investments and income from the shares held as investment, was offered to tax as 'Capital Gains' which is also discernible from the Balance Sheet of the appellant.

4.5 It is the fact of the case that total number of scrips finding place in appellant's opening stock, purchases, sales and closing stock are 201 in respect of LTCG 85 12 in respect of STCG. Out of these 201 scrips, 191 scrips sold during the year were in existence in appellant's investment since a long period. As regards the 12 scrips, there have been 35 transactions resulting in STCG of Rs. 1,61,25,492/-. It is further the fact of the case that the appellant in his books of accounts has reflected these transactions into shares as investment and not as stock in trade.

4.6 The AO has considered that the appellant is engaged in the business of trading in shares and the STCG resulting from the transactions of purchase & sale of shares is assessable under the head profits & business. The contention of the AO is that 35 transactions have been carried out by the appellant in respect of the 12 scrips resulting in STCG and therefore the transactions are basically in the nature of trade where the holding period is very short & intention of the appellant is to sell shares immediately on purchase to book profit.

4.7 However, on the perusal of the details as regards the STCG of Rs.1,61,25,492/-, it is observed that only 2 scrips namely Orissa Minerals Development Company Ltd. & KSB Pumps Ltd. constitute 98.95% of total STCG. Therefore, the AO's contention that the appellant is engaged in the business of share trading is not found to be acceptable. Though the investment in shares is on a large magnitude but the same shall not decide the nature of transaction.

4.8 The facts remains that the appellant is holding the shares as investment from year to year. Therefore, in order to determine the

nature of transaction conducted by the appellant, the intention of the appellant has to be seen. Similar transactions of sale and purchase of shares in the preceding years have been held to be income from capital gains both on long term and short term basis. The transaction in the year under consideration on account of sale and purchase of shares is same as in the ., preceding years. There is no basis for treating the appellant as a trader in shares, when it is observed that his intention was to hold the shares in Indian Companies as an investment and not as stock in trade as discernible from the above facts. Further it is pertinent to note that since the investment in shares were made in the earlier years wherein the treatment of the shares as investment was accepted as such by the AO in those years, therefore, such shares will not automatically become stock in trade in the year they are sold.

4.9 *In view of the above facts, it is held that when the AO once treats the shares held by the appellant as "Capital Asset" u/s. 2(14) of the Act, then as per section 45 of the Act any profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to income tax only under the head "Capital Gains".*

4.10 *As regards to Capital Gain, the issues in earlier assessment have been discussed before CIT(A) and I.T.A.T Mumbai where both higher authorities have decided it as capital gain. Infact identical issue was raised in earlier years, i.e. A.Y. 2003-04, 2004-05 & A.Y. 2006-07 wherein the CIT(A) has held that such income has to be treated as capital gains and not business income. Against the said order of CIT(A), further appeal was preferred before Income Tax Appellate Tribunal. However, the appeal challenged only treatment of short term capital gains and not in respect of treatment of long term capital gains as such. Thus it is observed that the appellant has been consistently and continuously for the period prior to these appeals, for the intervening period as also for subsequent years, has declared the income/loss from shares under the head Capital Gains to be held as investment only, whether it is loss or profit. ,*

4.11 *Therefore under the principles of consistency, a different view cannot be taken on the same facts. The rules of consistency as pronounced by the Hon'ble Bombay High Court in the case of Gopal Purohit 228 CTR 522(BOM) would be squarely applicable into the facts of the appellant's case.*

4.12 *The facts as aforesaid of the appellant's case are also covered in favour of the appellant by the decision of honourable juris dietional ITAT in the case of Nagindas P Sheth vs ACIT.*

4.13 *Since the facts are similar for this assessment year as compared to the preceding assessment years and in the preceding assessment proceedings u/s. 143(3) and/or in the Appellate proceedings, the Investment income is held as Capital Gain and therefore the principles of Res judicata as well as principle of continuity is applicable for this assessment year as well as also held by the **Hon*ble Supreme Court** in the case of **Radhasoami Satsang, Saotni Bagh, Agra vs.***

Commissioner of Income Tax, 1992 AIR 377, 1991 SCR Supl.(2) 312, 1992 SCC(1) 659JT 1991(4), 313, 1991 Scale(2)1199.

4.14 *Further the recent CBDT Circular No.6/2016 dated 29/02/2016 clarifies the position in respect of listed shares and securities which are held for a period of more than 12 months immediately preceding the date of its transfer, that, if the appellant desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer. However, this stand, once taken by the appellant in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years.*

4.15 *The stand of the appellant that his principle activity is to INVEST in various shares and securities and the intention of the appellant are revealed in various manners in the books of accounts and Return of Income filed in Income Tax Department from last several years which has been accepted by Income Tax Department in various assessments and orders of CITs (Appeal) and Tribunals clarifies the position.*

4.16 *In view of the above decisions and circulars of the CBDT, the contention of the appellant that when there is precedent of the Appellant's own case and where the facts are similar in this assessment year as compared with the Appellant's own case in earlier assessment years and when Hon'ble ITAT and Hon'ble CIT (A) held in favour of the appellant, then in such circumstances no contrary view is required to be taken is found to be acceptable.*

4.17 *Therefore, in view of the facts and circumstances of the case and discussion herein above, and the binding nature of the decision of hon'ble ITAT in the appellant's own case, the action of the AO in treating income so reflected from the dealing into the shares as business income is not found to be sustainable."*

4. At the outset, learned AR placed on record the order of the Tribunal in assessee's own case for the A.Y.2003-04, 2004-05 and 2006-07, wherein issue has been decided in favour of the assessee and Tribunal held that income from sale of shares held by the assessee as investment cannot be treated as business income.

5. We had carefully gone through the orders of the authorities below as well as order of the Tribunal in assessee's own case dated 15/06/2011,

wherein Tribunal held that assessee was holding shares as investment, therefore gain arising out of their sales are allowable to be taxed as capital gain instead of business income.

6. Learned AR also invited our attention to the fact that assessee as an investor was holding shares for the long period and inspite of manifold increase in the market value, the assessee has preferred to hold the shares than to sale the shares and this clearly shows that assessee is an investor. In view of the above discussion and respectfully following the order of the Tribunal in assessee's own case, we do not find any infirmity in the order of CIT(A) for treating the gain on sale of shares as capital gain instead of business income.

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

Order pronounced in the open court on this 20/04/2018

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 20/04/2018

Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai