



IN THE INCOME TAX APPELLATE TRIBUNAL "J", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM

&

SHRI PAWAN SINGH, JM

ITA No.3113/Mum/2015 & 7501/Mum/2016

(Assessment Year :2006-07 & 2003-04)

M/s. Superior Financial Consultancy Services Pvt. Ltd., 201B, Dev Neo Vikram, Sahakar Nagar CHS, New Link Road Andheri (W), Mumbai – 400 053	Vs.	Assistant Commissioner of Income Tax Circle- 1(3) Mumbai
PAN/GIR No.AACCS2302J		
Appellant)	..	Respondent)

ITA No.3355/Mum/2015

(Assessment Year :2006-07)

Assistant Commissioner of Income Tax Circle- 1(3) Mumbai	Vs.	M/s. Superior Financial Consultancy Services Pvt. Ltd., 201B, Dev Neo Vikram, Sahakar Nagar CHS, New Link Road Andheri (W), Mumbai – 400 053
PAN/GIR No.		AACCS2302J
Appellant)	..	Respondent)

Assessee by	Shri V.G. Ginde
Revenue by	Ms. Arju Garodia
Date of Hearing	05/04/2018
Date of Pronouncement	30/05/2018

आदेश / O R D E R

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

These are the cross appeals filed by assessee and revenue against the order of CIT(A) for the A.Y.2006-07 & 2003-04 in the matter of order passed u/s.143(3) of the IT Act.

2. Rival contentions have been heard and record perused. During the course of assessment proceedings, the AO noted that the assessee had shown long term and short term capital gains on sale of shares, which were earlier, held as stock-in-trade. The AO noted that the assessee had converted the stock-in-trade into investments with the sole object of claiming deduction u/s 10(38) and lower rate of taxation u/s 111 A. The AO also noted that the assessee had been carrying on activity of dealing in shares in an organized fashion and had incurred an expenditure of Rs 54,00,000/-. In the past, the assessee had been showing business income from trading. Therefore, relying upon various decisions, the AO held that the act of converting stock-in-trade into investment was with the sole purpose of avoiding payment of taxes. Therefore, the AO held that the income arising out of sale of shares was taxable as business income.

3. By the impugned order, CIT(A) after following the order of the Tribunal in assessee's own case for the A.Y.2004-05 held that the profit on sale of shares was liable to tax under the head capital gains. Revenue is in further appeal before us.

4. We have considered rival contentions and carefully gone through the orders of the authorities below and found that issue is squarely covered by the decision of the Tribunal in assessee's own case for the A.Y.2004-05 vide order dated 06/03/2013, precise observation wherein is as follows:-

"6. We have heard the parties and perused the material on record. it is relevant to state that the Ld. CIT(A), for the purpose of deciding the case has elaborately discussed /hree main issues, namely {1}

whether the assessee can legally convert its stock-in trade into investments, [ii] if yes, whether the conversion is motivated by tax avoidance and (iii) if not, whether the assessee can claim to be an investor in some shares while doing speculation in other shares.

6.1 As regards the legality of conversion of stock-in trade into Investments, the ld.CIT has correctly held that there is no specific bar for the said conversion and vice versa in view of the decision of the Hon'ble Supreme Court in the case of Sir Kikabhai Premchand (24 IIR 506] (SC) wherein it has been held that such conversion is not something not known to the commercial world and there is no legal bar on the same.

6.2 On the second issue as to whether the conversion is motivated by tax avoidance, shorn off extracting the entire discussion, reading of paras 14.3 to 14.7 of the order of the Ld.CIT(A) clearly establishes that the Ld.CIT(A) has well appreciated the facts and thereby arrived at a correct conclusion that it is not the case that the assessee has entered into any sham transactions for avoiding tax and the conversion of stock into investment is transparent from the audited accounts of the assessee with clarificatory note appended in the Notes to Accounts for the FY 2002-03. As regards the argument /he Ld.DR that such conversion is to be treated as a sham transaction based on the decision of the jurisdictional High Court in the case of Twin star Holdings Ltd Vs Anand Kedia (260 ITR 6 Bom), we are of the view that the ratio of the said decision is not applicable to the facts in the present case as the former relates to such conversion by three investment companies and transmission of shares thereon.

6.3 Regarding the third issue whether the assessee can be an Investor as well as a speculator in shares simultaneously, the Ld.CIT(A) has relied on the decision of the Tribunal in the case of Vesta Investments & Trading Co.(P) Ltd (70 ITD 200)(Chd) wherein it has been held that in the case of assessee holding both shares as well as investments for which separate accounts are kept and if the Department in the past has accepted the sale of shares held as investments would give rise to capital gains and not business. Since the said decision is squarely applicable in the case of the assessee in the present case, we are of the view that the Ld.CIT(A) has rightly answered this issue affirmatively.

6.4 In view of that matter, we do not find any justifiable reason to interfere with the order of the Ld. CIT(A) directing the AO to assess the profits on sale of share under the head 'Capital Gains' and not as business income. Thus, the order of the Ld.CIT is hereby upheld."

5. As the facts and circumstances during the year under consideration are same, 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 directing the AO to treat the profit arising out of sale on shares as capital gains.

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

7. The issue involved in the appeal filed by assessee is whether the Ld. CIT(A) was justified in law, in directing the Ld. AO to make addition of Rs.9,11,883/- being the difference between the book value of shares held as stock-in-trade as on 31.03.2002 and the cost thereof at which the same were converted into investments on 1.4.2002, treating the same as business income u/s.41(l) of the Income-tax Act, 1961 upon their sale in F.Y. 2005-06.

8. Rival contentions have been heard and record perused. In the instant case, the assessee converted his stock-in-trade into investment on 01/04/2002 at cost. Prior to the said date, the stock was held as stock-in-trade. In other words, as on 31/03/2002, the value appearing in the books was cost or market, whichever was less. As the assessee had converted the stock-in-trade into investment at cost, the question which arose was how the difference between the cost and market rate was accounted for in the books of accounts. AO added the difference in assessee's income on the plea that assessee has already taken the benefit of reduction in market value as on the last date of balance sheet as compared to actual cost.

9. By the impugned order, CIT(A) brought to tax the benefits already taken by the assessee amounting to Rs.9,11,883/-, treating the same as business income after observing as under:-

2.6. I have perused the facts of the matter. As on 31.03.2002, the appellant had shown the stock in shares as market or cost, whichever is less. Assuming that the market value of certain shares was less than the cost, then while working out the profit for FY 2001-02 and earlier years the appellant would have claimed the resultant loss as business loss. However, at the time of converting these stock-in-trade into investment at cost, as on 01.04.2002, the appellant has taken the difference between the lower market rate and the cost to the capital reserve account. Likewise, while computing the capital gains in the previous year, the appellant has taken the cost of acquisition at cost, in keeping the ratio of the decision of the Bombay High Court in the case of Jannhavi Investments Pvt. Ltd. In other words, the loss allowed in the earlier years, which would have been taxable as business profits, if the appellant had not converted stock-in-trade into investments, has not been offered for taxation even though the same has now been recovered. In this regard, the provisions of section 41 (1)(a) are relevant, and read as under:

"41.49(5o)(1) Where an allowance or Reduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,—

(a) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not."

2.7. From the above provisions, it is very clear that if a person obtains any benefit in cash or otherwise in respect of any loss allowed to him in earlier years, the same shall be taxable as profits and gains of business of that previous year. Now there is no doubt that the appellant had been accounting for, till 01.04.2002, shareholding as on 31.03.2002 at cost or market whichever is less. Accordingly, the appellant had claimed a loss of Rs 9,11,883/-(annexure-1) on the stock-in-trade prior to 31.03.2002, and which was sold during the previous year as investment. This loss has now been made good by the appellant; as the same has been sold above cost. The resultant gain of Rs 9,11,883/- is, therefore, now taxable u/s 41(1) as business income. The ratio of the decision in the case of Jannhavi investments Pvt. Ltd. would not be applicable to the facts of the instant case. The AO is directed to bring to tax the sum of Rs 9,11,883/- as business income, while giving effect to this order.

10. It was argued by learned AR that CIT(A) was not justified in bringing to tax net the benefit taken by the assessee in earlier years at the time of conversion of stock in trade into investment in view of the judicial pronouncements in the case of Jannhavi Investments Pvt. Ltd. 304 ITR 276.

11. We have considered rival contentions and carefully gone through the order of the lower authorities and found that as on 31/03/2002, assessee had shown stock in shares at market or cost, whichever is lower, thereafter, assessee converted the stock of shares into investment. As and when assessee has treated the shares as stock in trade, the benefit of lower of cost or market price was taken, accordingly, profit of that year was reduced. During the year under consideration when the assessee had sold those shares, the excess over the cost price is liable to be taxed as capital gain / loss. However, the benefit already taken by the assessee by valuing these shares at cost or market whichever is lower in the earlier years when shares were treated as stock in trade is liable to be assessed as business income and CIT(A) had correctly brought the difference to tax net u/s.41(1) of the IT Act. The case law relied on by learned AR is distinguishable on facts, accordingly, we confirm the action of CIT(A).

12. In the result, both the appeal of assessee and revenue are dismissed.

Order pronounced in the open court on this 30/05/2018

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

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

Mumbai; Dated 30/05/2018
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.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai