

आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

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

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री जी. मंजुनाथ लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI G MANJUNATHA, AM

आयकर अपील सं./ ITA No. 6287/Mum/2016

(निर्धारण वर्ष / Assessment Year 2009-10)

Tikuchand D. Jogani 301, Gundecha Chambers, N.M. Road, Fort, Mumbai-400 023	Vs.	The Asst. Commissioner of Income Tax, 12(3) Room No. 135A, Aayakar Bhawan, M.K. Road, Mumbai-400 020
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. AAPJ8019Q		

अपीलार्थी की ओर से / **Appellant by** : Anuj Kisnadwala, AR

प्रत्यर्थी की ओर से / **Respondent by** : Shri DG Pansari, DR

सुनवाई की तारीख / Date of hearing:	31-07-2018
घोषणा की तारीख / Date of pronouncement :	03-08-2018

आदेश / ORDER

PER MAHAVIR SINGH, JM:

This appeal by the assessee is arising out of the order of Commissioner of Income Tax (Appeals)-28, Mumbai, [in short CIT(A)] in appeal No. CIT(A)-28/IT-229/DC-12(3)/2011-12 dated 26.08.2016. The Assessment was framed by the Asst. Commissioner of Income Tax, Circle 12(3), Mumbai (in short ACIT/ AO) for the assessment year 2009-10 order



dated 30.11.2011 under section 143(3) of the Income Tax Act, 1961(hereinafter 'the Act').

2. In this appeal there are two grounds regarding the issue of disallowance of loss claim by the assessee under the head gain from short term capital gain as against assessed by the AO as income from business or profession and the second issue is regarding disallowance of expenses relatable to exempt income. For this assessee has raised the following two grounds: -

"1. The learned Income Tax Officer erred in treating an amount Loss of Rs.1,42,33,203/- under the head Income from Business or Profession' instead of Gains from Short Term Capital Gains' disclosed by the appellant and while doing so he amongst others failed to appreciate that

(a) The Loss arising on transfer of the capital assets held by the appellant by way of shares was on account of the investments held by the appellant;

(b) The Loss disclosed by the appellant under the head Short Term Capital Gains/Loss was on account of the shares purchased with an intention of making an investment:

(c) The appellant had maintained separate books for the investments made and the business activities carried on of trading in shares



(d) *As in the earlier years, the appellant continued to be an investor in shares.*

(e) *The appellant was not a trader vis-a-vis the shares, which have yielded income/Loss under the head 'Short Term Capital Gains/Loss, as disclosed in the return of income filed.*

2. *The Income Tax Officer erred in disallowing Rs 39,79,8351- u/s 14A of the Income Tax Act as expenditure incurred in relation to earning of exempt income and in computing the disallowance u/r 80(2) of Income Tax Rules."*

3. At the outset, the learned Counsel for the assessee drew our attention to the order of CIT(A) and stated that the order of CIT(A) is totally ex-parte, despite the fact that many adjournments were allowed by CIT(A) from 2014 to 2016. The learned Counsel for the assessee stated that the CIT(A) on the first issue of claim of loss as given the following finding: -

"It is systematic, regular activity of appellant. AO has cited numerous judgements thereafter to cull out principles of what constitutes business activity. These aspects are not controverted at all in the written submissions of the appellant. The cited judgements by appellant when put against specific facts of this case lead to the conclusion that they do not apply. The treatment by AO of the loss as business loss



is found technically correct and the ground is dismissed."

4. Similarly, in respect of the disallowance of expenditure in relation to the exempt income by invoking the provisions of section 14A of the Act, read with Rule 8D(2) of the Income Tax Rules, 1962 (hereinafter 'the Rules'). The CIT(A) observing the issue reads as under: -

"This ground is in respect of disallowance of Rs.39.79 lacs u/s.14A. The same has been worked out as per Rule 8D because interest and other expenses have been incurred to earn exempt dividend income. The appellant in written submission has merely stated that the disallowance is based on presumption. The working has not been controverted. Accordingly, the disallowance is found in order and addition is confirmed."

5. In view of the above observations of CIT(A), the learned Counsel for the assessee stated that the CIT(A) has not actually adjudicated the issue by a speaking order and despite the fact that the assessee has filed complete details in its written submission dated 14.12.2012. Hence, the learned Counsel for the assessee requested that this matter be set aside to the file of the CIT(A) for fresh adjudication and he be directed to pass a speaking order in respect of the fact of the case.

6. We have gone through the order of CIT(A) and noticed that no doubt the CIT(A) has allowed many opportunities to the assessee but on one pretext or the other the assessee has asked for adjournments. This attitude of the assessee is deprecated. We also find that the CIT(A) has not passed a speaking order, which is a primary duty of the first appellate authority. Without being facts in the order of CIT(A), we cannot adjudicate



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the issue and hence, we set aside the order of the CIT(A) and restore the matter back to his file for fresh adjudication. Needless to say that the assessee will present himself as and when called for by the CIT(A) and will fully co-operate with the appellate authority in providing relevant information. The CIT(A) will decide these two issues as per law. Accordingly, this appeal of assessee is remanded back to the file of the CIT(A) and allowed for statistical purposes.

7. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 03-08-2018.

Sd/-

(जी. मंजुनाथ /G MANJUNATHA)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह /MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 03-08-2018

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, 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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai