

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH: KOLKATA

Before: **Shri M. Balaganesh, Accountant Member** and
Shri S.S. Viswanethra Ravi, Judicial Member

I.T.A No. 14/Kol/2016

A.Y: 2010-11

Income-tax Officer
Ward 4(2), Kolkata
[Appellant]

Vs.

M/s. Mountain Vanijya
Pvt. Ltd. PAN:AAECM4891J
[Respondent]

For the Appellant

: Shri A. Bhattacharya, Addl. CIT, Id. Sr.DR

For the Respondent

: Shri A.K. Tulsyan, FCA, Id.AR

Date of hearing : 26-06-2018

Date of pronouncement : 12-09-2018

ORDER

Shri S.S. Viswanethra Ravi, JM:

This appeal by the Revenue is directed against the order of the Commissioner of Income Tax (Appeals),12, Kolkata dt. 11-09-2015 for the A.Y 2010-11.

2. The only effective issue is to be decided as to whether the CIT-A is justified in directing the AO to treat the income derived from sale of shares under the head 'short term capital gain' in the facts and circumstances of the case.

3. After hearing both the parties and on perusal of record including the material as available before us and the relevant orders of ITAT, Kolkata as relied on by the Id.AR of assessee, we find that the issue involved in this appeal is in favour of assessee against the revenue. The appellant Revenue has been accepting the income derived by assessee from sale of shares by holding under the investment portfolio as short term capital gain as discussed by the CIT-A in his order at page-3 and as detailed therein in tabular form. It is noted that from A.Ys 2005-06 to 2008-09 & A.Y 2010-11, the assessment were completed under issuance of intimation u/s. 143(1)

of the Act. For the A.Ys 2011-12 & 2012-13, it is noted that the assessments were completed u/s. 143(3) of the Act. The contention of Id.AR was that the AO incorrectly held the income from sale of shares as business income and the AO should have followed the Rule of Consistency in assessing the profits on sale of shares as short term capital gain. The CIT-A held the income derived on sale of shares, which are under the portfolio of investment held to be as capital gain. The Id. AR placed on record the copy of assessments from A.Ys 2007-08, 2011-12 to A.Y 20016-17, pages 1-20 of the paper book and copy of intimation issued u/s. 143(1) of the Act for the A.Ys 2011-12 & 2016-17 and argued that the Revenue has been consistently accepting the profit on sale of shares/investment as capital gain under scrutiny proceedings. The Id. AR pointed out the filing of audited balance sheets as on 01.03.08 to 31.03.2016, for the A.Ys 2007-08 to 2016-17, pages 21-81 of the paper book. Before us the Id. AR of assessee filed detailed evidences in respect of claim by way of paper book filed for the A.Y 2010-11. On perusal of the same, we find force in the arguments/submissions of the Id.AR. Relevant portion of order of CIT-A is reproduced herein below for better understanding:-

"2.2. I have duly considered the rival contentions in the light of the facts of the case, details brought on record and the judicial pronouncements referred to. The issues involved have been discussed in details in the assessment order as well as in the written submission of the appellant as quoted hereinabove. Therefore, same is not discussed again to relieve this order from repetition. As it appears that the appellant company has been showing all shares under 'investment column' in preceding and succeeding assessment years since A.y. 2006-07. It never showed 'trading in shares' or 'opening or closing stock of shares' in its books of accounts. The appellant company has always shown the net income from sale of shares under the head STCG or L TCG depending upon the period of holding of individual share. Excepting this year, in all other earlier and later assessment years (some of them were completed u/s. 143(3) of the Act], the revenue accepted appellant's returns showing income/loss from STCG and LTCG. The transactions carried out in shares in the relevant year were exactly similar to the transactions carried out in all earlier and later years. In the earlier as well as later years the revenue had accepted income/loss arising from sale of shares declared by the appellant in its books of account as investments and as income from capital gains. Thus, for this relevant year, income cannot be assessed as business income merely for the reason that quantum was high, numbers of transactions were high and the appellant made good profit. The principle of consistency is to be maintained as held in various judicial pronouncements referred hereinabove. In making the assessment, the AO heavily relied on the decisions of the Hon'ble AP High Court in the case of P.V. S. Raju & Others. The facts of that case were not similar to that of appellant's case, as elaborately discussed in the submission of the Ld. AR as stated hereinabove,

2.3. The AO in his chart, mentioned total 108 transactions in shares in support of his arguments that the appellant company purchased shares when the price went down and sold the same when the price rose and therefore, the transactions were in the nature of

trading in shares. This is a bizarre argument as the motive of either investment or trading is to make profit and not loss. Nevertheless, it is found from the said chart, that the appellant company o had incurred loss in as many as 19 transactions. So, AO's findings are not fully correct. The other finding of the AO was that the appellant held those shares for few days before sales. However, from the chart submitted by the Ld. AR of the appellant it can be seen that in as many as 13 transactions, the appellant had held the shares for the periods in between 54 to 361 days and earned STCG. Another argument of the AO was that the shares purchased in the relevant year were sold during that year itself. However, AO's chart suggests that in 27 numbers of transactions, shares purchased in the previous year were sold in this year. Further, the AO has not treated the profit from similar type of transactions as business income where shares were held for more than 365 days and accepted such profit as LTCG as returned by the appellant

24. From the records it can be ascertained that the appellant's major investment (more than 90%) was in unquoted shares. On finding that the appellant had earned dividend income of Rs.1,03,321/-, the AO invoked the provisions of section 14A and disallowed expenses to the tune of Rs.1,43,802/-. It otherwise implies that the AO accepted that the appellant had investment in shares. So in one hand he treated the transactions in shares as investment for the purpose of application of section 14A and other hand, he treated the profit derived from same transactions as business income.

25. The appellant company has always returned the income from sale of its investment in shares under the head capital gain in earlier years as well as in the later years and such income have been consistently assessed in the hands of the appellant both under section 143(3) and 143(1) of the Act under the head capital gain, LTCG or STCG, depending upon the holding. In the light of the facts that similar transactions were accepted as capital gains by the Department not only in the earlier years but also in the later years, that the AO himself considered the said transactions as 'investment' for the purpose of disallowance of expenses u/s. 14A of the Act, and in view plethora of judicial pronouncements in this regard as referred to by the appellant as well as respectfully following the decisions of the Hon'ble jurisdictional Tribunal in the cases of Umesh Hiranand Chabbalni [ITA-561/Kol/2012]. Narin Prasad Dalmia [39 CCH 0035 (kol)], Merlin Holdings (P) Ltd. [29 CCH 776], I am of the considered opinion that the income of Rs.1,25,78,656/- derived by the appellant from share transactions is to be treated as Short Term Capital Gain (STCG). There ought to be uniformity in treatment and consistently when the facts and circumstances are identical. Hence, the AO is directed to treat the income of Rs.1,25,78,656/- as STCG. This ground of appeal is therefore, allowed. "

4. Before us the Id. AR placed his reliance on the order dt. 13-06-2018 passed by this Tribunal in the case of DPJ Vinoyog Pvt. Ltd Vs. DCIT, Cir-9, Kolkata passed in ITA No. 1003/Kol/2016 for the A.Y 2010-11 on identical issue and argued that when the assessee claimed the profit on sale of shares under the portfolio 'investments', income should be assessed as short term capital gain, referred to para 10-11 of the said order. Relevant portion of said order is reproduced herein below:-

"10. We are of the view that on the issue, whether income in question is to be assessed under the head 'income from capital or 'income from business' the assessee should demonstrate the intention and treatment in that books of accounts, whether he holds these shares and securities as an 'investment' or as a 'stock-in-trade'. The intention can be judged by the entry made by the assessee in his books of accounts, i.e., the treatment in his books of accounts of the assessee. We note that, since, the assessee has shown the investment in its books of accounts under the head 'investment' and not under the head 'stock in trade', therefore, the intention of the assessee is not to treat them business income but to treat them as an investment. We find strength of the above discussion in the judgment of Hon'ble ITAT, Kolkata in the case of M/s Divyan Tie Up ITA No.164/Kol/2016 Assessment Year 2010-11 wherein it was held as under:

"6. We are of the view that on the issue, whether the income in question has to be assessed under the head income from capital gain or income from business, the

assessee should demonstrate the intention and treatment in the books of accounts, whether he holds these shares and securities as an 'investment' or as a 'stock in trade'. This intention can be judged by the entry made by the assessee in his books of accounts, that is, the treatment in the books of accounts of the assessee. We note that since, the assessee has shown the investment in its books of accounts under the head investment and not under the head stock in trade, therefore, the intention of the assessee is not to trade in shares but to treat them as an investment.

7. We also note that the CBDT has issued Circular No.6 of 2016 wherein it has been provided as follows:

"2.....However, this stand, once taken by the assessee in a particular assessment year shall remain applicable in subsequent assessment years also and the taxpayer shall not be allowed to adopt a different/contrary stand in subsequent assessment years...."

This Circular is in respect of how to treat the income from shares, as business income or capital gains. Therefore, we note that the intention of the assessee is to treat the trading in shares as an investment in the books of accounts. The assessee has not shown the shares as a part of the closing stock in the balance sheet, the assessee has shown shares under the head investment, therefore, the intention of the assessee is not to trade in shares but to deal in shares as an investor."

11. *Therefore, considering the facts and circumstances of the assessee's case under consideration and the factual position discussed above, we note that assessee is having only one portfolio that is of investment and is consistently following to declare capital gain or loss on sale on investment, dividend is earned on investment and there is not stock in trade portfolio. Besides, the assessee is consistently valuing investment at cost and does not claim the diminution in valuing of investment. We have noted the intention of the assessee that the Board of Directors of the assessee company has passed the resolution stating that the motive of the company is to deal in investment and not to trade in shares, therefore, we are of the view that assessee's income i.e Short term Capital Gain by way of sale of investment should be assessed under the head 'capital gain' instead of 'business income'. Therefore, we direct the Assessing Officer to treat the assessee as an investor and assess the income under the head 'Short term Capital Gain'.*

5. In view of our aforementioned detailed discussion, we find no infirmity in the order of CIT-A. Ground nos. 1 to 3 raised by the revenue are dismissed.

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

Order pronounced in the open court on 12-09-2018

Sd/-
M. Balaganesh
Accountant Member

Sd/-
S.S. Viswanethra Ravi
Judicial Member

Dated : 12-09-2018

PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Revenue : Income Tax Officer, Ward 4(2), Kolkata
Aaykar Bhawan, 8th Fl., P-7, Chowringhee Sq., Kolkata-69.
2. Respondent/Assessee : M/s. Mountain Vanijya Pvt. Ltd.
4 Synagogue Street, 8th Fl., Suite: 803, Kolkata-1.
3. The CIT(A), 12 Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Senior Private Secretary
Head of Office, ITAT Kolkata