

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

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

I.T.A No. 370/Kol/2016

A.Y: 2010-11

**M/s. Echolac Vinmay
Private Limited**

PAN: AAACE 5809N

[Appellant]

For the Appellant

For the Respondent

Vs.

**I.T.O Ward 9(2)
Kolkata**

[Respondent]

: Shri Rajeeva Kumar, Advocate, Id.AR

: Shri S. Dasgupta, Addl.CIT, Id. DR

Date of hearing : 05-07-2018

Date of pronouncement : 28-09-2018

ORDER

Shri S.S. Viswanethra Ravi, JM:

This appeal by the Assessee is directed against the order of the Commissioner of Income Tax (Appeals), 11, Kolkata dt. 29-12-2015 for the A.Y 2010-11.

2. The only issue is to be decided as to whether the CIT-A is justified in confirming the disallowance made by the AO on account of business loss claimed on sale of shares in the facts and circumstances of the case.

3. Brief facts of the case are that the assessee is a company and engaged in the business of granting of loan and share trading. According to AO, on sale of equity shares of unquoted/unlisted companies the assessee suffered loss to an extent of Rs.62,80,000/-. The AO held the loss incurred in the business of share trading was partly on account of shares sold, which were held as investments and partly purchases made during the year. The AO treated the aforesaid loss as bogus and as such disallowed/added the same to the total

income of assessee vide his order dt. 30-03-2013 passed u/s. 143(3) of the Act.

4. The CIT-A confirmed the said disallowance as made by the AO and observed that the assessee failed to prove the genuineness of loss as claimed by the assessee.

5. After hearing both the parties, we noted that the Id.AR did not bring on record any evidence or whatsoever to controvert the finding of the AO in treating the loss as bogus. Before us the Id.AR reiterated the same as made before the CIT-A. Relevant portion of CIT-A's order is reproduced herein below:-

g) I have perused the Assessment Order as well as the submissions of the appellant. The case laws relied upon by the appellant in his submissions dated 15/12/2015 are distinguishable from the facts of this case. I find that the shares on which the appellant has incurred the loss are not traded in the stock exchanges & therefore their price is not available in a transparent manner and in the public domain. The appellant failed to produce Profit & Loss Account and Balance Sheet of the companies on whose shares it has incurred the loss. The Assessing Officer wanted to determine net worth of equity shares at the time of sale but could not do so on account of non-submission of relevant details to the Assessing Officer.

h). The Assessing Officer has correctly appreciated the facts of the case and judicial pronouncements in this regard. The relevant portion of the Assessment Order is reproduced as under -

"Now, it is pertinent to analyze briefly the facts of the present case and examine whether the loss suffered by the assessee in its share trading business should be allowed to be set off against income from the other business, i. e. the business of granting loans and advances.

The assessee undisputedly had made 'Investment' in shares in the year 2008-09. The same is also evident from the Balance Sheet of the assessee. The Authority for Advance Rulings in the case of Fidelity North Star Fund & Ors (288 ITR 641) held that whether the acquisition of securities is for business purpose or by way of investment can be decided with reference to the intention of the purchaser at the time of acquisition of security itself. For this purpose the authority held that entries made in the books of accounts are relevant because in case of purchase of securities for business purpose, they are shown by way of stock-in-trade whereas in investments, shares are disclosed in the accounts as investments. In the facts involved in the present case the shares were disclosed as 'Investments' in the Balance Sheet as on 31/03/2009 and therefore any gain/loss arising therefrom was assessable under the head 'Capital Gains'. The Kolkata Bench of Tribunal in its various decisions have time and again held that the manner in which the shares purchased are recorded in the books by the assessee i. e. as stock-in-trade or investments is a decisive criteria to determine the nature of gain/loss arising on sale of such shares. Since the shares were held as investments in the immediate preceding year the gain/loss arising on sale was assessable under the head 'Capital Gains'.

The assessee allegedly converted in shares into stock-in-trade in the month of April 2009 which was subsequently sold during the year under consideration resulting in business loss of Rs. 38,25,000/- This entire scheme is nothing but a tax avoidance arrangement. The assessee was unable to bring on record any corroborative evidence to their support of compelling reason for sale at steep discount than their cost price. The assessee merely filed self-serving statements which prima facie seems like an after-thought to avoid tax on the interest income earned in the course of business. Since the assessee failed to discharge its onus to bring on record sufficient material to show the commercial motive behind purchasing and selling of the same stock at steep discount as well as converting

investments into stock-in-trade, I therefore reject the assessee's claim for conversion of shares held as investments into stock-in-trade and the entire loss incurred on sale of such investments is to be treated as capital loss.

Attention in this regard is invited to the decision of Delhi Bench of ITAT in the case of Milestone Finance & Leasing Co. Ltd. Vs. JCIT (14 SOT 55) wherein the facts involved are similar to the facts of the present case. The assessee had purchased shares which were held as investments in the preceding years. In the year in question the assessee converted such investments into stock in-trade and subsequently sold it incurring a business loss. The Tribunal rejected [he assessee's contention that shares which were held as investment in the immediate preceding year was sold as stock-in-trade in the year in question. Following the same I am of the view that (he conversion of investment to stock-in-trade was a sham arrangement.

Even in the alternate the assessee failed to determine and bifurcate the capital loss based on the Fair Market Value (FMV) on the date of conversion in terms of Section 45(2) of the Income Tax Act, 1961. The assessee merely treated the cost of shares as the FMV on the date of conversion. The shares in question were unlisted shares and it was the onus of the assessee to prove that the FMV as on that date was same as the cost of acquisition especially when the very same shares were sold for losses within a period of one year. The assessee further failed to bring any material evidence to show as to how the share prices of the investments plummeted to such extent from the date of conversion to the date of sale. The case of the assessee is covered by the decision of Supreme Court in the case of McDowell Ltd Vs. CTO(AIR 1986 SC 649) wherein it was held that any scheme for avoidance of taxation under the garb of new & sophisticated legal devices needs to be pierced and to expose the devices for what they really are and to refuse to give judicial benediction. The Supreme Court in the case of Vodafone International Holdings B. V. Vs Union of India (341 ITR 1) has upheld the validity of the decision rendered in the case of McDowell Ltd (supra) and has held that tax avoidance agreement are to be exposed by the Department.

In view of the above, discussion, it is held that the aforesaid loss of Rs.38,25,000/- is treated to be a bogus loss and disallowed to be set off against interest income of the assessee. It is further stated that even if for the sake of argument it is assumed that losses were real, loss incurred on sale of shares of Rs.38,25,000/- was truly in the nature of capital loss and hence is assessable under the head 'Capital Gains'.

i). The claim of loss has been made by the appellant and therefore, the onus to prove the genuineness of the loss squarely falls on the appellant. In the case of Smt. Harjit Kaur v. ACIT, Sirsa [2014] 45 Taxmann.com 186 (P&H) the Hon'ble High Court of Punjab & Haryana has held that _.

"Income - Chargeable as (Tax planning) - Assessment Year 2008-09 - Assessee sold land which resulted in short-term capital gain - In same year' assessee claimed short-term capital loss on sale of shares of an unlisted company which were purchased in same year-Assessing Officer disallowed said claim of short-term capital loss by treating it as bogus and not genuine- Facts revealed that such trading transactions of purchase and sale of shares had not been effected, for commercial purpose but to treat artificial loss, with a view to reduce tax liability-Transactions of shares were not governed by market factors prevalent at relevant time in such trade, but same were product of design and mutual understanding on part of assessee- Further, shares were related to unlisted company-Whether Assessing Officer was right in holding that assessee resorted to a preconceived scheme to procure short term capital loss for purpose of neutralizing short-term capital gains by way of price difference in share transactions not supported by market factors- Held, yes-Whether cumulative events in such transactions of shares revealed that same were devoid of any commercial nature and fell in realm of not being bona fide and, hence impugned loss was not allowable-Held, yes."

This onus has not been discharged by the appellant. It is very clear that it is a colourable transaction to adjust income from interest with the artificial loss created by the sale of shares of the companies in question. "

6. In view of our above discussion, we find no infirmity in the impugned order of the CIT-A and it is justified. The grounds raised by the assessee are dismissed.

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

Order pronounced in the open court on 28-09-2018

Sd/-
P.M.Jagtap
Accountant Member

Sd/-
S.S. Viswanethra Ravi
Judicial Member

Dated :28-09-2018

PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Assessee M/s. Echolac Vinmay Pvt. Ltd 6 Hanspukur Lane, 1st Floor, Room No. 106, Kolkata-7.
2. Respondent/Revenue I.T.O. Ward 9(2), Aaykar Bhawan, P-7 Chowringhee Sq., Kolkata-69.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata
/True Copy, By order,

Senior Private Secretary
Head of Office, ITAT Kolkata