

IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “A”, KOLKATA
BEFORE SH. P.M.JAGTAP, VICE PRESIDENT &
SH. S.S.VISWANETHRA RAVI, JUDICIAL MEMBER
ITA No.47/KOL/2017
(ASSESSMENT YEAR-2004-05)

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| DCIT, Circle-11(1), P-7, Chowringhee Square, Kolkata-700069. | vs | M/s. Kalamkari Designs Pvt.Ltd., 138, Beliaghata Square, Kolkata-700015. PAN-AABCK2117N |
| (Appellant) | | (Respondent) |
| Appellant by | | Sh. Soumesh Dash, Addl. CIT DR |
| Respondent by | | Sh. D.S.Damle, FCA |
| Date of Hearing | | 06.09.2018 |
| Date of Pronouncement | | 04.12.2018 |

ORDER

PER S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

This appeal filed by the Revenue against the order dated 17.10.2016 passed by CIT(A)-10, Kolkata for AY 2004-05.

2. The assessee is a company and is a manufacturer and exporter of garments.
3. Ground No.1 raised by the Revenue challenging the action of the CIT(A) in deleting the addition made on account of Long Term Capital Gain as against the income from other sources held by the AO.
4. According to AO, the assessee earned profit of Rs.49,85,861/- on sales of shares and booked the same as “other income”. The same has been shown as Long Term Capital Gain in the computation of total income and sought set off against forwarded Long Term Capital loss.
5. The AO treated the said profit as income from other sources and denied set off against the forwarded loss by the reasons as under:

a. “The Auditor had qualified In the Tax Audit Report that the investments were held in the name of the Director of the Company.

b. The investments transacted in the course of the year were held in the demat account of the Director. The AO also concluded that the contract notes would be in the name of the Director.

c. As the Company and the Director are distinct and separate entities, the transactions made by the Director cannot be treated as those of the Company.

d. According to the Ld. AO, the property/Capital asset was held by the Director, and the company- assessee did not have any rights over them. The Ld AO depended upon the case laws cited in the assessment order.

e. As the transactions had been made in the demat account of the Director, the Company was not at all the owner of the transactions leading to assets.

f. The Ld AO did not take cognizance of the submission that the demat account of the Director was used for the transactions, as according to the Ld. AO a new demat account for the Company could have been quite easily opened.

g. The Ld. AO disallowed the claim of Capital Gain/ Loss, but considered the income as the income of the company, albeit under the head of "other Sources'.

h. He also held that the STCG/ STCL could not be adjusted against the carried forward LTCL."

6. Before the CIT(A), the assessee contended as under:-

a. "In the computation of income an amount of Rs.49,85,861/- was disclosed under the head Long Term Capital Gain and the same was set off against brought forward LTCG loss.

b. The conclusions and inferences made by the Ld. AO are erroneous and self contradictory. It was contended that while it was a fact that that the investments were transacted through the demat a/c which Was standing in the name of Sri Suresh Chander Kumar, Director, all the funds for making investments were entirely provided by the appelland-company.

c. It was contended that the assessee-company, out of its surplus funds had made investments in shares of other bodies corporate with' a view to earn capital appreciation, and that however, as the assessee company did not have demat etc of its own, the investments made out of its own funds were merely routed through the demat a/c of its Director.

d. It was submitted that the Director of the appelland-company had permitted the company to utilize his own demat a/c only in his fiduciary capacity and on the express understanding that all cost of investments shall be borne by the Company and consequently losses or profits arising from alienation or transfer of the investments will also be on company's a/c.

e. It was also argued by the appelland that such investments were made even in the earlier years, and it was not a case where the investments in quoted shares by the company were transacted through Director's demat a/c for the first time in A.Y. 2004-05. The appelland also enclosed copy, of company's audited a/cs for the

immediate preceding A.Y. 2003-04, and pointed out that in the Investment schedule for year ended 31.3.2003, the auditor had Similarly qualified the fact that quoted equity shares were held as investments in the name of one of the Directors. According to the Ld. A.Rs, the note in the earlier year was thus identically worded as in the A.Y. 2004- 05.

f. It was submitted that even in the earlier year's balance sheet, investments made in shares which were held In the Director's demat etc were disclosed in the assessee's balance sheet as its Investment since the funds required for making investments were expended out of Company's own resources. A copy of the Assessment Order for A.Y. 2003-04 was also enclosed to bring to notice that In the immediate preceding year the Ld. AO did not draw the inference that the shares transacted through the Director's demat a/c did not belong to Company, even while the shares were transacted through the director's demat etc, it was not held by the AO that the shares,' belonged to Director. On the contrary, it was argued the losses incurred by the assessee on sale of investment shares were assessed as appellant's own Income/loss. The shares held as investments were sold in the earlier year and loss incurred was assessed as deemed "speculation loss" but on appeal it was held that the loss was assessable in the assessee's hands under the head capital gain and it was allowed to be carried forward in the assessee's hands."

g. It was argued by the appellant / Ld. A.Rs for the appellant that in the assessee's own case the factual matrix during the year under consideration remained same as in earlier year, and that even though in the earlier year the investments in shares were held in the demat a/c belonging to Director, the Ld.AO had accepted that the shares beneficially belonged to the assessee since entire cost of investment was borne by the company. The Shares were disclosed as "asset" of the Company in the balance sheet prepared till 31.03.2003 and that position was accepted by the Revenue without question. It is also material to note that the funds necessary for making investments were always provided by the Company out of its own resources. The purchase & sales of these shares were always accounted in the company's books. These facts considered cumulatively therefore clearly established that beneficial ownership in these investments always belonged to the Company and the Director had only permitted the company to route its investments through his individual' demat a/c. However, the said Director never held any rights or beneficial interest in the shares which at all material times belonged to assessee-company and hence accounted in the books of the Company. It is also relevant to submit that the method and manner of making and holding investments through Director's demat etc was same in the earlier years as well. In the balance sheet of earlier year similar disclosure were made but no inference was drawn by the AO that investments did not belong to the assessee. In the circumstances, it was submitted, that the Ld. AO could not depart from such accepted position and hold that the investments did not belong to the assessee.

h. It was argued that the Ld. AO's finding in this regard is also contrary to the ratio laid down by the Jurisdictional Calcutta High court in the case of CIT Vs Ajit Kumar Roy (252 ITR 468). In this case a flat was purchased in 1973 in the name of wife of Sri A K Roy ,but entire investment in the flat purchased was provided by the assessee.

The assessee's wife was only a house maker and had no independent sources of income. In the A.Y. 1981~82 the said flat was sold but no income was disclosed in the hands of the assessee i.e. the husband. On these facts the AO took the view that since the money invested in the flat was entirely provided by the husband and the flat was also occupied by the assessee then whatever gain or income was 'derived from the flat after 1973 was the income of the assessee i.e. husband. It will thus be noted that the High court considered the substance of the transaction and found that husband was the real owner of the property even though legal title to the flat was in the name of his wife. According to High Court the income actually belonged to the person who had provided the resources for purchase of the property and mere legal title was not sufficient for deciding the issue of taxability in the hands of the real owner.

i. It was argued by the Ld.A.Rs. for the appellant-company that if one applies the ratio laid down in this decision then it will be noted that funds required for purchase of the investments were provided by the Company, and that whatever money that was necessary for making investment went out of Company's coffers. It was submitted that all the transactions for purchase & sale of shares were accounted in the Company's books though transacted through Director's demat a/c. It was submitted that in the earlier year when the loss was incurred from investment transactions routed through the director's demat a/lc; the loss was assessed in the Co's hands and was allowed to be carried forward by the co. In the circumstances the Ld.AO cannot be permitted to take a different stand in the latter year when the assessee made gains on transfer of shares. It was therefore pleaded that the Ld.AO be directed to assess the income under the head 'capital gains' and not under the head "other sources"; It was also pleaded that the ld.AO be further directed to set off such gains against capital loss brought forward from the earlier years instead of setting it off against business loss of the current year.

j. It was further contended by the Ld. A.Rs that there is yet more infirmity or anomaly in the Ld. AO's order, and that if one accepts the Ld. AO's finding that the shares actually belonged to Director then the Ld.AO could not assess any income in the assessee's hands. It was contended that the Ld.AO has not denied the fact that the gains of Rs.49,85,861/- actually arose from sale of shares transacted through Director's demat etc, and as such the Ld.AO was satisfied that source of such income was transfer of shares held as investments. It was accordingly argued that if one accepts the Ld. AO's hypothesis then such gains would have been chargeable in the Director's hands and could not become assessable as appellant's income merely because the assessee accounted such Income in its books. It was pointed out that it is by now settled legal proposition that taxability of an income in the assessee's hands depends on the charging provisions of the Act as' also in the substance of the transaction, and that it does not depend either on the form adopted or entries recorded in the books r~ the parties. It was accordingly argued that if as per the Ld. AO's finding the shares legally belonged to the director then the gain made on sale of shares was legally chargeable only in the assessment of the Director and could not be brought to tax under the residuary head in someone else's assessment merely on the ground that the income was accounted in the assessee's books. It was therefore finally argued that the Ld. AO's findings were thus contradictory and cannot be sustained. It was submitted that the ld.AO be directed to

assess to RS.49,85,861/- as capital gains, and' be further directed to allow its set off against brought forward from earlier years under the head capital gains."

7. The CIT(A) considering the submissions of the assessee, deleted the addition and directed the AO to assess the said sum as capital gain and allowed set off against the forwarded loss. The relevant portion of which is reproduced herein below:-

3. *"I have carefully examined the facts of the case, and find that there is no dispute that the demat account of the Director of the Company was utilized' for routing the transactions in shares made by the appellant-company. I have also examined the copy of the assessment order for the immediate preceding assessment year 2003- 04, passed by the Ld AO u/s 143(3) of the Income Tax Act dated 31.03.2006, and the order of the Ld.CIT(Appeals) passed in Appeal No. 934/CIT(A)-XXIV/W-11(2)/ 11-12 dated 29.06.2012. The Order of the 1st appellate Authority was also challenged in the Hon'ble ITAT by the Department, and the Hon'ble ITAT-"C"-Bench, Kolkata, in ITA NO.1305/Kol/2012 dated 08.01.2014 has dismissed the grounds taken by Revenue before that forum. These precedents may not exactly cover the matter at hand in the present ground of appeal, but it is also true that on a similar set of facts and circumstances (namely utilization of the demat account of the Director by the Company to route its transactions) the Ld.AO and the Higher Authorities have not taken any adverse view. I find that it is also true that the Auditor had made similar qualifying remarks for the immediate preceding A.Y 2003-04 also in the Tax Audit Report. I find that the Ld. AO has revolved his entire arguments on the issue of the "ownership" of the investments, on grounds that the demat account of the Director had been utilized, and that such action by the assessee-company would disqualify the company from legitimate ownership. However, the more vital aspect about the source of the funds being from the Company has not been disputed at all by the Ld.AO. I find strength in the contention made by the Ld. A.Rs that the shares were disclosed as "asset" of the Company in the balance sheet prepared till 31.03.2003 and that position was accepted by the Revenue without question. There can be no doubt therefore that the funds necessary for' making investments were always provided by the Company out of its own resources. It is also apparent that the purchase & sales of these shares were always accounted in the company's books. These facts contribute to enhance the view that the beneficial ownership in these investments always belonged to the Company and the Director had only permitted the company to route its investments through his individual demat a/c. That said, as these Investments appeared in the Audited Financial statements of the appellant company, it cannot be said that any rights vested with the Director of the said Company.*

4. *As regards the ownership, I find that the appellant's reliance on the Hon'ble jurisdictional High Court decision in the case of CIT Vs Ajit Kumar Roy is well placed. In that case, reported in [2002] 121 Taxman 248 (Calcutta) [equivalent citation [2001]252 ITR 468 (Calcutta) & 170 CTR 187(Calcutta)] date of*

With such a view of the matter, I find that the action of the Ld.AO cannot be sustained, and the Change of Head of Income is restored in favour of the appellant assessee. Consequently, the Ld. AO is directed to assess the impugned amount of Rs.49,85,861/- as capital Gains only. As a corollary, the Ld .AO is also further directed to examine and allow the claim of set-off made by the appellant against the brought-forward losses from earlier years under the head Capital Gains. Grounds 1 to 4 accordingly stand allowed in favour of the assessee-appellant.”

8. Before us, the Ld.DR submits that, the assessee did not produce relevant evidence i.e. auditor note, contract note, order and referred to page no.3 of AO and CIT(A) accepted the submissions of the assessee and given relief. The Ld.DR relied on the order of the AO.

9. Ld.AR submits that the assessee has no demat account on its own and it has become compulsory to have own demat account for companies from 2010 onwards. The assessee admits that it was a mistake to transact in the demat account of its Directors and it was rectified from subsequent years. The Ld.AR placed reliance on the decision of Hon'ble High Court of Caluctta and argued that the income has to be assessed in the hands of person or company which provided funds to the transaction. The Ld.AR submits that the order of CIT(A) is perfect and supported the same.

10. Heard both parties and perused the material available on record. It is observed that all the investments made out of assessee's account and it was routed through the demat account of its Director. The CIT(A) accepted the submissions of the assessee that in the earlier years, the AO assessed the same as capital gain the fact of which not disputed by the Ld.DR. The fact of treating the assessee is the beneficial owner of the said investments and the Director allowed his demat account for assessee's business transaction in purchase and sale of shares is not disputed by the assessee. We agree with the finding of CIT(A) in paras 3 & 4 of his order which were reproduced herein above for ready-reference. Therefore, we find no infirmity in the order of CIT(A). Thus, Ground No.1 raised by the Revenue fails and it is dismissed.

11. Ground No.2 & 3 raised by the Revenue challenging the action of the CIT(A) in accepting the reconciliation of sales submitted by the assessee in the first appellate proceedings violating Rule 46A of Income Tax Rules, 1962.

12. Heard both the parties and perused the material available on record. The Ld.AR submitted that there was no new evidence ever filed before the CIT(A) and violation of Rule 46A does not arise. Similar issue basing on same identical facts has been decided by this Tribunal in favour of the assessee for immediately preceding year i.e. A.Y 2003-04 in assessee's own case vide order dated 08.01.2014 in ITA No.1305/Kol/2012 and referred to para 11 of said order which is placed at pages 70 to 74 of Paper Book. On perusal of the impugned order at para No.10, we find the CIT(A) examined the assessment record and held that there was no change in material facts involving the present issue from that of A.Y. 2003-04 and by placing reliance on the decision of this Tribunal deleted the addition. No contrary order was put on record by the Ld.DR before us passed by higher forum in respect of order dated 08.01.2014 in ITA No.1305/Kol/2012 of assessee's own case for A.Y. 2003-04, therefore, we find no infirmity in the order of CIT(A) and it is justified. Thus, Ground No.2 & 3 raised by the revenue fails as are dismissed.

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

Order pronounced in the open court on 04.12.2018.

Sd/-
(P.M.JAGTAP)
VICE PRESIDENT

Sd/-
(S.S.VISWANETHRA RAVI)
JUDICIAL MEMBER

Date:- 04.12.2018
Amit Kumar

Copy forwarded to:

1. Appellant- DCIT, Circle-11(1), P-7, Chowringhee Square, Kolkata-700069.
2. Respondent- M/s. Kalamkari Designs Pvt.Ltd., 138, Beliaghata Road, Kolkata-700015.
3. CIT-Kolkata
4. CIT(Appeals)-Kolkata
5. DR: ITAT -Kolkata Benches

By order

AR/H.O.O
ITAT, KOLKATA