

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE SHRI R.S. SYAL, VP AND
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No.1450/PUN/2009

निर्धारण वर्ष / Assessment Year : 2006-07

Sakal Papers Ltd.
595, Budhwar Peth,
Pune-411 002.
PAN : AAACS7605Q

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax,
Circle-6, Pune.

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.926/PUN/2013

निर्धारण वर्ष / Assessment Year : 2006-07

The Assistant Commissioner of Income Tax,
Circle-6, Pune.

.....अपीलार्थी / Appellant

बनाम / V/s.

Sakal Papers Ltd.
595, Budhwar Peth,
Pune-411 002.
PAN : AAACS7605Q

.....प्रत्यर्थी / Respondent

Assessee by : Shri Ashok Kothary

Revenue by : Shri Sudhendu Das

सुनवाई की तारीख / Date of Hearing : 18.12.2018

घोषणा की तारीख / Date of Pronouncement : 20.12.2018

आदेश / ORDER**PER PARTHA SARATHI CHAUDHURY, JM :**

These cross appeals preferred by the assessee and Revenue emanates from separate orders of the CIT(Appeals)-III, Pune as on record.

2. ITA No.1450/PUN/2009 is the appeal preferred by assessee whereas ITA No.926/PUN/2013 is the appeal preferred by the Revenue. These cases were heard together. Since the facts similar, issues common, they are disposed of vide this consolidated order. First we would take up the appeal of the assessee in ITA No.1450/PUN/2009.

ITA No.1450/PUN/2009 (By Assessee)
A.Y.2006-07

3. In ITA No.1450/PUN/2009, the assessee has raised following grounds:

“On the facts and the circumstances the learned Assessing Officer and Commissioner of Income Tax Appeal erred in

1. In treating an amount of Rs.5,28,64,636/- earned out of sale of investment in shares as business income and not as capital gains (Rs.5,14,03,098/- and short term capital gains Rs.14,61,538/-) as returned by the assessee. The same being in the nature of capital gain be treated as capital gain and not as business income.

2. In disallowance the claim of Rs.44,95,264/- under section 80IA. This action being not in accordance with the law it is prayed that the same may be allowed.

The appellant named above craves to add, alter, to amend and to modify the grounds as and when required.”

4. With regard to ground No.1, the Assessing Officer has treated an amount of Rs.5,28,64,636/- earned out of sale of shares as ‘business income’ and not as ‘capital gains’ as returned by the assessee. On perusal of the Audit Report, Assessing Officer noticed that the assessee was trading in

shares. It started investing its surplus funds in stock in trade. At the beginning of the F.Y.2004-05, the assessee company converted some of the shares held as stock in trade into capital assets. Later on these shares were sold in the F.Y.2005-06 and the capital gain was worked out as a result of such sales. As per the assessee's calculation, short term capital gain was worked out at Rs.14,61,538/- and long term capital gain was worked out at Rs.5,14,03,097/-. On being required by the Assessing Officer to explain as to why the short term and long term capital gains shown by the assessee be not treated as 'business income', an elaborate submission was made by the assessee before the Assessing Officer and relevant parts of the submission needs to be mentioned herein below.

"There are no such specific provisions for conversion of stock-in-trade into capital assets. Position, however, is now fairly clear due to a few recent decisions.

The Pune Bench of the Tribunal, in a third member decision in the case of Kalyani Exports and Investment Pvt. Ltd. Vs. Dy. CIT 78 ITD 95 (zerox copy attached) considered a situation where shares were acquired by the assessee in 1977 and held by it as stock-in-trade till 30th June, 1988. These were converted into capital assets on 1st July 1988, and were subsequently sold. The Tribunal held that the assessee was entitled to take the cost of the shares as on the date of acquisition 1977, to substitute such cost by the fair market value as on 1st April 1981 and to indexation of cost from 1981. According to the Tribunal, the acquisition by the assessee was only once and that was at the time of acquisition as stock-in-trade. There was no deeming fiction to deem the conversion of stock-in-trade into capital assets as a transfer or to deem the fair market value as on the date of conversion as the cost of acquisition of the capital assets.

The tribunal relied upon the decision of the Supreme Court in the case of Sir Kikabhai Premchand vs. CIT 24 ITR 506, for the proposition that no man can make a profit out of himself and on the decision of the Calcutta High Court in the case of CIT vs. Dhanuka and Sons 124 ITR 24, where the High Court held that there could not be any actual profit or loss on withdrawal of stock from a trading business. It is clear from this decision of the Supreme Court that conversion of stock-in-trade into capital asset and vice-versa is permissible and the assessee can decide as per his requirement what should constitute stock-in-trade and what should constitute capital asset. The assessee, in the case before you, has acted in accordance with the well established principles of law in converting its stock-in-trade into capital asset.

Further, the Tribunal drew an analogy from the cases of transfer of agricultural land, where agricultural land, which was not a capital asset, subsequently became a capital asset due to the amendment to the

Income- Tax Act. In those cases, the Gujarat High Court in Ranchodbhai Bhajibhai Paid Vs. CIT 81 ITR 446, followed the Bombay High Court in Keshavji Karsondas vs. CIT 207 ITR 737, had held that an asset cannot be acquired first as a non-capital asset at a different point of time and again as a capital asset at a different point of time. There can be only one acquisition of the asset and that is when the assessee acquires it for the first time, irrespective of its character at that point of time. Therefore what is relevant for the purpose of capital gains is when the asset was acquired, and not when it became a capital asset.

The Tribunal also noted the fact that there is no specific provision for tax treatment of conversion of stock-in-trade into investment, similar to the provisions of section 45(2) which provide for the manner of taxation of the capital gains arising on conversion of investment into stock-in-trade. This decision of the Tribunal has been upheld by the Bombay High Court in the case of CIT vs. Jahnavi Investments (P) Ltd. 215 CTR (Bom) 72. The High Court has confirmed the fact that even after the scheme of cost indexation has been introduced, the principles laid down by the Gujarat and Bombay High Courts in the context of agricultural land still hold good.

Therefore, on the basis of venous decisions of courts and discussion above, the effect of such conversion of stock-in-trade into investments and subsequent sale can be summarized as under.

- 1. The assessee has converted its stock-in-trade into investment in accordance with the principles of law and practice.*
- 2. There is no transfer on conversion of stock-in-trade into investments and no income arising on such conversion.*
- 3. Conversion of stock-in-trade into investments has to be at cost/book value.*
- 4. When investments are sold, the period of holding would include the period for which the shares were held as stock-in-trade.*
- 5. The date of acquisition of the shares would be the date when the shares were purchased as stock-in-trade, both the for the purpose of substitution of cost and at 1/4/1981 as well as for indexation of cost.*
- 6. The cost of shares would be the price paid for the shares when they were acquired as stock-in-trade.”*

5. The submission so made did not find favour with the Assessing Officer who after referring to provisions of Section 2(47) and Section 45(2) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) held that the conversion of stock-in-trade into investment cannot be considered as transfer. The Assessing Officer observed that there are no specific provisions u/s.45 dealing with conversion of stock-in-trade into capital assets. The Assessing Officer observed that the assessee had purchased the shares with an intention

to keep them as stock in trade and not as investments. Relying upon the principles laid down by the Hon'ble Supreme Court in the case of CIT Vs. H. Holck Larsen, reported as 160 ITR 67, the Assessing Officer hold that the act of the assessee in purchasing shares showed that he intended to hold shares as stock-in-trade only. The Assessing Officer further observed that the various judgements relied upon by the assessee were not applicable in the case of the assessee as they did not deal with the issue in the present case i.e. whether conversion of stock-in-trade into capital assets could be treated as transfer. Thus, the Assessing Officer rejected the claim of earning of capital gain as a result of sale of shares and treated the profit derived on sale of shares as profits derived from trading business.

6. When the matter travelled upto the ld. CIT(Appeals), he simply reiterated the findings of the Assessing Officer and upheld the addition so made without adjudicating in details whether the action of conversion of stock-in-trade of shares to investment was specifically prohibited or not or from any legal parameters where such action of the assessee could be accepted so far as the Income Tax Act is concerned. The ld. CIT(A) merely disposed of the issue upholding the version of Assessing Officer. That being further aggrieved, the assessee carried the matter in appeal before us.

7. At the time of hearing, Ld. AR vehemently argued that nowhere in the Income Tax Act prohibits conversion from stock-in-trade of shares to investments. There is no direct embargo restricting the assessee from converting stock-in-trade of shares to investments. The only point is once converted the pattern is to be maintained. Such conversions have been allowed by various judicial pronouncements. The Ld. AR has placed reliance on the following decisions:

i) ITA No.4208/Mum/2007 in the case of ACIT-1(3) Vs. M/s. Superior Financial Consultancy Services Pvt. Ltd.

ii) Sir Kikabhai Premchand Vs. CIT, reported as 24 ITR 506 (SC)

8. On the other hand, Ld. DR has strongly placed reliance on the order of sub-ordinate Authorities and submitted that whereas intention was to keep the shares in stock-in-trade and thereafter, conversion to investments, was not permissible within the ambit of taxing statutes.

9. We have perused the case record and heard the rival contentions. We also analyzed the facts and circumstances in this case. We find that in the case of ACIT-1(3) Vs. M/s. Superior Financial Consultancy Services Pvt. Ltd. (supra.), facts and circumstances were exactly similar to the instant case on hand. In that case before the Mumbai Bench of the Tribunal, the assessee, a private limited company, engaged in the business of borrowing and lending funds reflected stock-in-trade of Rs.8,30,95,223.15 in its P & L account as on 31.03.2002 and converted its stock-in-trade of shares to investment with effect from 1.04.2002. Accordingly, the assessee reflected its stock of shares in its balance sheet as 'investment' as on 31.03.2003. During the year under consideration (A.Y.2004-05) the assessee sold shares out of the shares converted into investment and has claimed long term capital gain on sale of such shares amounting to Rs.7,13,29,191/-. In the assessment framed u/s.143(3) of the Act, the Assessing Officer assessed the same as business income on the reason that the act of the assessee shifting the value of stock-in-trade to the head investment clearly indicated the colourable mind of the assessee and thus intentionally avoided the payment of tax @35%. On appeal, the Ld. CIT(A) allowed the claim of the assessee holding that there was no

specific bar on conversion of stock-in-trade into capital asset or vice versa and observed that the assessee had later on discontinued the activity of trading in shares and converted its stocks in investment. The CIT(A) relied on decision of Hon'ble Supreme Court of India in the case of Sir Kikabhai Premchand (24 ITR 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.

10. In our considered view in the entire framework of the Income Tax Act, there is no direct and specific embargo for conversion of stock-in-trade of shares to investment and vice versa. That over the years, Hon'ble Courts have held once such conversation has taken place, assessee should maintain that pattern. There should not be any further change in the pattern and thereby, statement of the accounts should also be maintained. In effect, there should not be any action of the assessee by which any loss arises to the Revenue. In the instant case, it is not disputed that conversion has taken place from stock-in-trade to investment and also that the Hon'ble Apex Court has observed that such conversion has no legal bar. Therefore, in view of the matter, we set aside the order of CIT(Appeals) on this issue. Accordingly, **ground of appeal No.1 raised in appeal by assessee is allowed.**

11. Ground No.2 relates to disallowance of claim of Rs.44,95,264/- under section 80IA of the Act.

12. At the time of hearing, Ld. AR of the Assessee appraised the Bench that the issue is squarely covered by the assessee's own case in ITA No.937/PUN/2008 for the assessment year 2005-06.

13. On the other hand, Ld. D.R very fairly conceded to this submission of the ld. AR.

14. We have perused the case record and heard the rival contentions. In ITA No. 937/PUN/2008 for assessment year 2005-06, on the similar issue of claim of deduction u/s.80IA of the Act, it was held and observed by the Pune Bench of the Tribunal as under:

"38. We find that the issue raised in the present appeal is squarely covered by the order of Tribunal in ACIT Vs. M/s. RDS Construction Co. in ITA No.135/PUN/2016, relating to assessment year 2011-12, order dated 09.04.2008, wherein it was held as under:

"10. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is the allowability of deduction under section 80IA(4)(iv)(a) r.w.s. 80IA(5) of the Act. The assessee had set up first windmill in assessment year 2006-07 and the second windmill in assessment year 2007-08. In the initial years, there were losses from windmill activity. The assessee was simultaneously carrying on business of civil construction, from which the assessee was making profits. The said losses were adjusted against the income arising from other business: activity of the assessee. For the first time, the windmill activity had shown profit in assessment year 2010-11 and the assessee claimed deduction under section 80IA(4) of the Act. The said year i.e. assessment year 2010-11 was the initial assessment year for claim of deduction under section 80IA(4) of the Act. The CIT(A) at page 22 has given a finding that there were no brought forward losses in the hands of assessee and the same were adjusted upto assessment year 2009-10. The Assessing Officer for assessment year 2010-11 had not allowed the claim of deduction on account of windmill activity. However, the CIT(A) and the Tribunal thereafter, allowed the claim of deduction.

11. The issue which is raised in the present appeal is the aforesaid claim of deduction u/s.80IA(4)(iv)(a) of the Act in respect of windmill business. The Tribunal in assessee's own case (supra) in assessment year 2010-11 had already allowed the claim of assessee. The case of Revenue is that the losses of earlier years if have not been absorbed, then the same have to be adjusted against the undertaking before allowing deduction under section 80IA(4)(iv)(a) of the Act. The CIT(A) in the present case has given a finding that there were no brought toward losses in the hands of assessee, which in any case were adjusted upto assessment year 2009-10. The said findings of CIT(A) have not been controverted by learned Departmental Representative for the Revenue except to stress that the same needs verification. We find no merit in the plea of learned Departmental Representative for the Revenue in this regard, especially where in assessment year 2010-11 which was the preceding year to the instant assessment year. The claim of deduction has been allowed in the hands of assessee. It may also be pointed out herein itself that the assessee was running civil construction activity from which it was showing profits from year to year and the losses arising from windmill in the earlier years have already been set off against the said income and the balance income had been assessed in the hands of assessee. It is not case of Revenue that after adjustment of losses in the respective years the assessee had shown any losses. There is no merit in the order of Assessing Officer in holding that deemed losses have to be adjusted against profits of undertaking. In view thereof, we hold that the assessee was entitled to the claim of deduction under section 80IA(4)(iv)(a) of the Act. The grounds of appeal raised by the Revenue are thus, dismissed."

39. The issue raised in the present appeal is identical to the issue before the Tribunal. Further, the Hon'ble Supreme Court dismissed the Special Leave Petition filed in the case of CIT Vs. Best Corporation Ltd.(supra.), wherein the High Court held that since it had consistently followed decision in the case of Velayudhaswamy Spinning Mills (P.) ltd. Vs. ACIT (2012) 340 ITR 477 (Mad) and on the basis of said decision CBDT had issued Circular No.1 of 2016, dated 15.02.2016 clarifying term 'initial assessment year' in section 80IA(5) of the Act, order of Tribunal holding that assessee was entitled to deduction under section 80IA of the Act without setting off losses/unabsorbed depreciation pertaining to windmill, which were set off in earlier year against other business income was deserved to be upheld.

40. The CBDT vide Circular No.1/2016, dated 1502.2016 has also clarified situation of claim of deduction under section 80IA(4) of the Act by any concern by adopting initial assessment year as the first year of claim, irrespective of the fact that the windmill was installed and started functioning in any of the earlier years. Following the same parity of reasoning, we hold that the assessee is entitled to claim deduction u/s.80IA(4) of the Act. The ground of appeal No.4 raised by the assessee is thus, allowed.”

Respectfully following our earlier decision, **we allow the ground of appeal No.2 of the assessee.**

15. Last ground of appeal is general in nature and hence, needs no adjudication.

16. In the result, appeal of the assessee in ITA No.1450/PUN/2009 is allowed.

ITA No.926/PUN/2013 (By Revenue)
A.Y.2006-07

17. In Revenue's appeal, though Revenue has taken multiple grounds of appeal, however, the crux of the grievance of Revenue is deletion of penalty u/s.271(1) (c) of the Act. The Assessing Officer levied penalty u/s.271(1)(c) of the Act on two counts viz. (i) Rs.1,76,29,666/- in respect of profits on sale of impugned shares & unit treated as 'business income' by the Assessing Officer being upheld by the Id.CIT(A) and (ii) penalty levied of Rs.15,16,105/- in respect of withdrawal of deduction u/s.80IA(4) of the Act which were deleted

by the First Appellate Authority. It is with regard to this relief granted by the Ld. CIT(A), Revenue has preferred appeal before us.

18. We have perused the case record and analyzed the facts and circumstances of the case. We find that the CIT(Appeals) in his extensive order analyzing this issue has referred to the decision of Hon'ble Supreme Court in the case of Liberty India Vs. CIT, reported in 317 ITR 218 (SC) and further, it is observed by the Ld. CIT(Appeals) as follows:

“5.5.4 The Apex Court in the case of Liberty India categorically held that the eligible profits are to be computed as if such eligible business is the only source of income of the assessee. However, the ITAT Pune in the case of Serum International Ltd. in ITA Nos. 290 to 292/PN/2010 dated 28.09.2011 for the A.Ys. 2004-05 to 2006-07, following the decision of the Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills (P.) Ltd. 38.DTR 57 held that when the assessee exercising the option, only the losses of the year beginning from the initial asst. year (A.Y.2005-06 in the instant case) are to be brought forward and not the losses of the earlier year, which has been already set off against the other income of the assessee. In view of the decision of the Apex Court in Liberty India's case, decision of Bombay High Court in the case of Cipla Ltd., decision of ITAT, Special Bench and other decision of ITAT, Pune in the cases referred (supra.) and the explicit provisions of section 80IA(5), with great respect, I am not able to persuade myself to subscribe to the view of the ITAT, Pune on this issue rendered in the case of Serum International Ltd. However, in so far the levy of penalty under section 271(1) (c) is concerned, the issue involved appellant's making a claim deduction under section 80IA as furnishing of inaccurate particulars of income. The expression 'inaccurate particulars of income' do not extent to the issues, which are capable of different interpretations under law and therefore the case of the appellant cannot be said to be a case of 'furnishing of inaccurate particulars of income'. Further, the appellant has filed an explanation that he was of the bona fide view that the profits from windmill unit are eligible for deduction u/s.80IA without setting of notional brought forward losses against the eligible profits of the current year. One may or may not agree with the understanding of law of the appellant on this issue, but the fact that there can be a bona fide view to that effect cannot be ruled out in view of the decision of ITAT, Pune in the case of Serum International Ltd. referred supra. Simply because the Assessing Officer chose to reject the appellant's legal claim, it would not ispo facto mean that the explanation was not bona fide. Therefore, the case of the appellant is not even hit by the mischief of any of the three situations envisaged by the deeming fiction under Explanation 1 to section 271(1)(c). As already observed earlier, on the facts and in the circumstances of this issue, the appellant could not be said to have furnished inaccurate particulars of income. In these circumstances, I am of the considered opinion that the Assessing Officer is not justified in imposing penalty of Rs.15,13,105/- under section 271(1)(c) in respect of addition made on account of withdrawal of deduction claimed u/s.80IA(4).”

19. The Ld. CIT(A) has passed his decision on factual analysis and interpretation along with guidance taken from the decision of Hon'ble Apex Court in the case of Liberty India Vs. CIT (supra.) wherein, it has been categorically held that the eligible profits are to be computed as if such eligible business is the only source of income of the assessee. Further, Ld. CIT(A) analyzed that the Assessing Officer has apparently proceeded to treat assessee's making a claim of deduction under section 80IA as furnishing of inaccurate particulars of come. The expression 'inaccurate particulars of income' cannot be extended to the issues, which are capable of different interpretations under law and therefore, the case of the assessee cannot be said to be a case of 'furnishing of inaccurate particulars of income'. Accordingly, we do not find any infirmity with the findings of ld.CIT(Appeals) and hence, relief provided to the assessee is sustained.

20. In the result, appeal of the Revenue in ITA No.926/PUN/2013 is dismissed.

21. In the combined result, appeal of the assessee in ITA No.1450/PUN/2009 is allowed and appeal of the Revenue in ITA No.926/PUN/2013 is dismissed.

Order pronounced on 20th day of December, 2018.

Sd/-
R.S. SYAL
VICE-PRESIDENT

Sd/-
PARTHA SARATHI CHAUDHURY
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 20th December, 2018.

SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT (Appeals)-III, Pune.
4. The CIT-III, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

		Date	
1	Draft dictated on	18.12.2018	Sr.PS/PS
2	Draft placed before author	19.12.2018	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		