

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD òCö BENCH

**Before: Shri Mahavir Prasad, Judicial Member
And Shri Amarjit Singh, Accountant Member**

**ITA No. 3316/Ahd/2015 & CO No. 8/Ahd/2016
Assessment Year : 2011-12**

The DCIT, Circle-1(3), Ahmedabad-15 (Appellant)	Vs	M/s. Shah Investors Home Ltd. SIHL House, Opp. Jain Temple, Nehrunagar Cross Road, Ahmedabad-380015 PAN: AAAFCS4436C (Respondent)
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**Revenue by: Shri Lalit P. Jain, Sr. D.R.
Assessee by: Shri S.N. Soparkar and
Ms. Urvashi Shodhan, A.R.**

Date of hearing : 15-01-2019
Date of pronouncement : 26-02-2019

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

This revenue's appeal and assessee's cross objection for A.Y. 2011-12, arise from order of the CIT(A)-10, Ahmedabad dated 04-09-2015, in proceedings under section 143(3) of the Income Tax Act, 1961; in short òthe Actö.

2. The brief fact of the case is that the assessee has filed return of income declaring total income of Rs. 547,25,270/- on 16th Sep, 2001. Subsequently,

the case was selected under scrutiny by issuing of notice u/s. 143(2) of the act on 31st July, 2012. The remaining facts of the case are discussed under the different grounds of appeal of appeal:-

1st ground of appeal (deleting of Rs. 5,62,586/- u/s. 36(2) of the act)

3. During the course of assessment proceedings on verification of the details filed by the assessee, the assessing officer has noticed that assessee has claimed bad debit in respect of principal amount of transaction on which the clients have defaulted and such amount of transactions were never taken by the assessee for computation of its income at any time . The assessee claimed that assessee company has recieved only brokerage income on such transaction which has been credited in the P & L account of the assessee company. Therefore, it cannot be said that requirements of section 36(2) of the act have not been applied. The assessing officer has not accepted the explanation of the assessee and held that the provisions of section 36(2) of the act were not complied with and hence the assessee's claim of bad debt was not allowable.

4. Aggrieved assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has allowed the appeal of the assessee stating that the issue in the case is covered

5. We have heard the rival contentions and perused the material on record carefully. During the course of assessment proceedings on verification for the details furnished by the assessee, the assessing officer

has noticed that assessee has debited the P & L a/c under the head bad debt on account of amount of Rs. 5,62,586/- remain unrecovered from the 11 parties. The assessing officer has disallowed the impugned amount on the ground that the assessee has debited only brokerage amount and the purchase price to be paid by the clients were not reflected as income in the P & L account of the assessee. The ld. CIT(A) has allowed the claim of the assessee by following the order of his predecessors in the case of the assessee itself for assessment year 2008-09 and assessment year 2010-11. With the assistance of the ld. representatives, we have gone through the material on record and observed that the ld. CIT(A) has placed reliance on the decision of Bonanza Portfolio Ltd wherein the Honøble Delhi High Court has held that the brokerage payable by the client is a part of the debt and that debt has been taken into account in the computation of income and conditions stipulated u/s. 36(2) r.w.s. 36(1)(iii) of the act stands satisfied. On similar facts the claim of the bad debt was allowed by the Honøble Delhi High Court in the case of D.B. (India) Securities Ltd. 318 ITR 46 and Honøble Bombay High Court in the case of Shreyans S. Morakhiya 342 ITR 282 (Bom). The ld. Counsel has also brought to our notice that the Co-ordinate Bench of the ITAT vide ITA No. 142/Ahd/2014 for the assessment year 2010-11 in the case of the assessee has decided the similar issue on identical facts in favour of the assessee. In view of the aforesaid facts and legal finding, we do not find any infirmity in the decision of the ld. CIT(A). Accordingly, this ground of appeal of the Revenue stands dismissed.

2nd ground [Deleting disallowance of Rs. 1,41,51,296/- u/s. 40(a)(ia)]

6. During the course of assessment, the assessing officer has noticed that assessee has deducted TDS u/s. 194C of the act on payment made to NSE on account of transaction charges at Rs. 89,20,984/- and to BSE on account of transaction charges at Rs. 19,53,908/-. However, he was of the view that the charges paid to stock exchanges were in the nature of fees for technical services and TDS was required to be made on such payment u/s. 194J of the act. He was of the view that the entire trading in securities was managed by the stock exchange through screen based system provided by the stock exchange therefore stock exchange provides managerial services in the nature of technical services. Therefore, he held that the assessee was required to deduct tax u/s. 194J of the act on the above payment and accordingly he has disallowed the aforesaid amount on transaction charges paid to BSE and NSE u/s. 40(a)(ia) of the act.

7. Aggrieved assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has allowed the appeal of the assessee.

8. We have heard the rival contentions and perused the material on record carefully. The assessing officer has noticed that the assessee has paid transaction charges to the amount of Rs. 10874884/- to the NSE and BSE during the year under consideration. The assessee has deducted tax on the payment of transaction charges u/s. 194C of the act. However, the assessing officer was of the view that tax should have been deducted u/s. 194J on the ground that the transactions charges paid to the stock exchange were in the nature of fees for technical services. During the course of appellate proceedings before us, the Id. counsel has submitted that the Co-

ordinate Benches of the ITAT vide ITA 3113/Ahd/2013 assessment year 2010-11 and the Honøble Jurisdictional High Court of Gujarat vide Tax appeal No. 713 of 2017 in the case of the assessee have itself decided the similar issue against the revenue. With the assistance of the ld. counsel, we have gone through the aforesaid decision of the Honøble High Court of Gujarat wherein it is held that such charges are merely in the nature of recovery of expenses of the exchange and cannot be termed as charges for providing any professional or technical service. It is further held that the stock exchange cannot be termed as providing professional or technical services. The Honøble Gujarat High Court has also rejected the plea of the Revenue about the applicability of the section 194J in respect of lease line charges after following the decision of Honøble Supreme Court in the case of CIT vs. Kotak Securities Ltd. reported in (2016) 383. In the light of the above facts and judicial findings, we do not find any merit in the appeal of the Revenue, therefore, this ground of appeal of the revenue is also dismissed.

3rd, 4th 5th grounds of appeal:-

Ground No. 3 Deleting addition of Rs. 6,66,923/- by treating STCG on shares as business income.

Ground No. 4 Deleting addition for Rs. 3,47,33,381/- by treating STCG on shares as business income.

Ground No. 5 Deleting addition of Rs. 33,49,082/- treating capital gain on mutual funds as business income.

9. All the grounds of appeal from 3 to 5 are identical, therefore, they are adjudicated together as under.

10. During the course of assessment proceedings, the assessing officer has noticed that assessee has shown capital gain arising of sale of shares/MF as

short term capital gain and long term capital gain. However from the detail of sales and purchase of shares/securities submitted by the assessee, he has observed that assessee was engaged itself in systematic activity of sale and purchase securities/MF. He has further noticed that during the year the assessee has claimed short term capital gain of Rs. 6,66,923/- and long term capital gain of Rs. 3,47,33,381/- and held that such periodical activity of sale and purchase of shares/securities/MF definitely constitute business activity. Therefore, he has treated the income shown under the head capital gain as income or profit from business or provision.

11. Aggrieved assessee has filed appeal before the Id. CIT(A). The Id. CIT(A) has allowed the appeal of the assessee.

12. We have heard the rival contentions and perused the material on record carefully. During the course of assessment on verification of the detail filed by the assessee, the assessing officer has observed that assessee is engaged itself in systematic activity of sale and purchase of securities/mutual funds for profit motive and not for the purpose of making investment in shares/securities/mutual funds. However, the Id. CIT(A) decided the issue in favour of the assessee following the decision of the Bombay High Court in the case of CIT vs. Gopal Purohit 188 Taxman 140 Gujarat High court in the case of CIT Vs. Rewashanker A Kothari 283 ITR 338 Sarnath Infrastructure (P) Ltd. vs. ACIT 124 ITD 71 (LUK) and CBDT Circular No. 4 of 2007 dated 15th June, 2007 and stated that:-

“6.6 I have also seen the submission furnished by the AR of the Appellant. I completely agree with the arguments of the AR of the Appellant that the AO is not justified in treating Capital Gain as Business income.

6.7 In view of the decisions of Bombay High Court in the case of CIT vs. Gopal Purohit 188 Taxman 140, Gujarat High Court in the case of CIT vs. Rewashanker A Kothari 283 ITR 338, Sarnath Infrastructure (P.) Ltd. vs. ACIT 124 ITD 71 (Luk). and CBDT Circular No.4 of 2007, dated 15th June, 2007, following principles emerges to decide whether activity of dealing in shares can be treated as business activity or investment activity, which are compared with the facts of the case of the Appellant as under in order to adjudicate the issues before me :

(1) What is the intention of the assessee at the time of purchase of the shares (or any other item). This can be found out from the treatment it gives to such purchase in its books of account. Whether it is treated as stock-in-trade or investment. Whether shown in opening/closing stock or shown separately as investment or non-trading asset.

In the present case before me, I have seen that the Appellant has shown purchased shares under the head "Investments" in the Balance Sheet and not as Stock-in-trade, (pg. nos. 25-27 of P/B) Whenever said shares are sold, it has to be deducted from the "Investments" held and if any unsold shares are there as on the last day of the financial year, then it would be reflected under the- head "Investment" in Balance Sheet and not as "closing stock.

(2) Whether assessee has borrowed money to purchase the shares and paid interest thereon? Normally, money is borrowed to purchase goods for the purposes of trade and not for investing in an asset for retaining.

Going through the assessment order, it is seen that it not even the case of the AO that the Appellant has borrowed money to make an investment in shares.

(3) What is the frequency of such purchases and disposal in that particular item? If purchase and sale are frequent, or there are substantial transactions in that item, it would indicate trade. Habitual dealing in that particular item is indicative of intention of trade. Similarly, ratio between the purchases and sales and the holdings may show whether the assessee is trading or investing (high transactions and low holdings indicate trade whereas low transactions and high holdings indicate investment.)

In the present case, it is seen that the Appellant has entered into only 44 scripts and 33 scripts to earn LTCG and STCG respectively, in other words, on an average 3-4 transaction in shares per month. This shows that the volume and magnitude of the transaction in shares were very less. Therefore, it is not appropriate to hold that the Appellant is engaged in the business activity of trading in shares and therefore the Appellant is a trader and not investor, until and unless any finding is coming on record that the Appellant is engaged in day to day activity of purchasing and selling of particular share.

(4) Whether purchase and sale is for realizing profit or purchases are made for retention and appreciation in its value? Former will indicate intention of trade and later, an investment. In the case of shares whether intention was to enjoy dividend and not merely earn profit on sale and purchase of shares. A commercial motive is an essential ingredient of trade.

The Appellant has earned substantial amount of exempt dividend of Rs.17,00,687/- (pg. no.12 of P/B), which also shows that the intention was to make investment in shares and not to trade.

(5) How the value of the items has been taken in the balance sheet? If the items in question are valued at cost, it would indicate that they are-investments or where they are valued at cost or market value or net realizable value (whichever is less), it will indicate that items in question are treated as stock-in-trade.

Going through the Balance Sheet, it is seen that investments are stated at cost as per accounting policy of the Appellant and not at the lower of cost or market value. (Pg. no.30 of P/B)

6.8 Comparing factual case of the Appellant with the Principles laid down by the various authorities and CBDT Circular (supra) as above, I am of the opinion that the activity of selling of shares / mutual funds in the present case cannot be treated as trading activity but investment

activity. Hence, the AO is not justified in treating Capital Gain arising from sale of shares / mutual funds as business income. I therefore direct the AO to treat the Capital Gain arising from selling of shares / mutual funds as Capital Gain only.

6.9 It is further seen that similar action was also taken by the AO in the immediate preceding A.Y.2010-11 and A.Y.2008-09 in treating the Capital Gain as business Income. My predecessor in his appellate orders for A.Ys.2010-11 and assessment year 2008-09, following the order of Ahmedabad Tribunal in the case of Shri Sugamchand C. Shah vs. ACIT in ITA Nos. 3554/Ahd/208 for AY 2005-05 and 1932Ahd/2009 for AY 2006-07, has held that the shares held for a period more than 30 days should be treated as investment and resulting gain should be treated as capital gain and not as business income. In the present case, it is seen that not a single shares were held for a period less than 30 days, and therefore, I also concur the view taken by my predecessor in earlier A.Ys. 2008-09 and 2010-11 and hold that the AO was not justified in treating Capital gain as Business Income.”

It is also brought to our notice that the Co-ordinate Bench of the ITAT in the case of the assessee itself vide ITA 3113/Ahd/2013 assessment year 2010-11, ITA 3134/Ahd/2011 assessment year 2008-09 have decided the similar issues in favour of the assessee. In view of the above facts and judicial decision including findings of the Co-ordinate Benches of the ITAT as supra, we do not find any error in the decision of the Id. CIT(A). Accordingly, this ground of appeal of the revenue is dismissed.

CO No. 8/Ahd/2016 filed by assessee

1st ground of cross objection is against the decision of Id. CIT(A) in confirming disallowance of Rs. 6,18,302/- invoking rule 8D(3) u/s 14A on account of administrative expenditure

13. In this connection, it is noticed that during the course of assessment proceedings, the assessing officer has noticed that assessee has claimed exempt dividend income of Rs. 17,00,687/- and assessing officer has disallowed an amount of Rs. 6,18,302/- out of administrative expenditure u/s. 14A r.w. Rule 8D being 0.5% on average investment. The assessee has

filed appeal before the Id. CIT(A). The Id. CIT(A) is dismissed the appeal of the assessee.

14. We have heard rival contentions and perused the material on record carefully. After considering the volume of investment, we are of the view that exempt income cannot be earned without incurring the administrative expenses, therefore, we do not find any reason to interfere in the decision of Id. CIT(A), therefore, this ground of appeal of the assessee is dismissed.

2nd ground of cross objection is pertained to the issue that Id. CIT(A) has not adjudicated its ground of appeal challenging of disallowance u/s. 14A to the book profit

15. In this connection, we have noticed that the Id. CIT(A) has held that the tax payable under normal provision of the act and total income was assessed under normal provisions of the act, therefore, the issue regarding 115JB/14A was academic at present, therefore, this ground of cross objection of the assessee become infructuous and dismissed.

16. It is undisputed fact that in the case of the assessee the tax payable was determined under normal provision of the act, therefore, the Id. CIT(A) has not adjudicated the tax payable u/s. 115B of the act. In the light of the above, we are of the view that adjudicating this ground of cross objection is for academic purpose. We have heard both the sides and perused the material after referring the mentioned judicial pronouncements referred by the Id. counsel wherein it is held disallowance u/s 14A cannot be added for computing the book profit u/s. 115JB of the act.

We have noticed that in the following two decision of the coordinate benches Ahmedabad it is held that disallowance u/s 14 A of the act cannot be considered for computing book profit u/s 115JB of the act. after following the decision of the Special Bench Tribunal in Vineet Investment Pvt.Ltd. in ITA No.502/Del/2012 dated 16.06.2017.

- (i) ITA No. 1816/Ahd/2011 Arvind Ltd. vs. DCIT (ITAT Ahmedabad)
- (ii) Gujarat Lease Financing Ltd. vs. ITO (ITA No. 876 & 1288/Ahd/2005)

In view of the mentioned facts and judicial pronouncements, the cross objection on this issue filed by the assessee is allowed .

17. In the result, the appeal of the revenue is dismissed and cross objection of the assessee is partly allowed.

Order pronounced in the open court on 26-02-2019

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER

Ahmedabad : Dated 26/02/2019

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

आदेश क० तालम अ० षत / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलालय आधिकरण,
अहमदाबाद