

THE INCOME TAX APPELLATE TRIBUNAL
“D” Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 5135/Mum/2017 (Assessment Year 2007-08)
I.T.A. No. 5136/Mum/2017 (Assessment Year 2012-13)

ACIT-24(1) Room No. 604 6 th Floor, Piramal Chamber Parel, Mumbai-400012. (Appellant)	Vs.	Shri Deepak K. Shah 31-B, 1 st Floor Laxmi Industrial Estate Azad Road, Andheri East Mumbai-400 069. (Respondent)
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C.O No. 326/Mum/2018 (Assessment Year 2007-08)

Shri Deepak K. Shah 31-B, 1 st Floor Laxmi Industrial Estate Azad Road, Andheri East Mumbai-400 069. (Appellant)	Vs.	ACIT-24(1) Room No. 604 6 th Floor, Piramal Chamber Parel, Mumbai-400012. (Respondent)
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PAN : AVEPS4654B

Assessee by	Shri Rajan Vora
Department by	Shri Durga Dut
Date of Hearing	31.1.2019
Date of Pronouncement	28.3.2019

ORDER

Per Shamim Yahya (AM) :

These appeals by the Revenue and cross objection by the assessee arising out of respective orders of learned CIT(A) and pertain to A.Y. 2007-08 and 2012-13. In Revenue's appeal common grounds are raised. For the sake of reference we refer to the grounds of appeal raised for A.Y. 2012-13.

Revenue's appeal

2. Grounds of appeal read as under :

1. "Whether on the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in allowing business income of Rs. 1,62,95,0467- as Long Term capital gains of Rs. 1,78, 33, 4647- and Short

Term Capital Loss of Rs. 15, 38,4187- and ignoring the decision of Gujarat High Court in the case of CIT vs. Motilal Hirabhai Spg & Wvg Co. Ltd [1978] 113 ITR 173 (Guj) and Raja Bahadur Visheshwar Singh vs CIT [1961] 41 ITR 685 (SC) wherein it is stated that when the assessee has huge quantum periodic, repetitive and voluminous with substantial regularity of transactions then it indicate systematic and organized activity with profit motive."

2. "Whether on the facts in the circumstances of the case and in law, the Ld CIT(A) has erred in directing the AO to treat the income earned by the assessee from transacting in shares as capital gains and not business income by relying upon his decision in the case of the assessee for AY 2010-11 ignoring the fact that the nature of the issue is such that the principle of Res Judicata cannot be applied and the Ld. CIT(A) has passed cryptic order without demonstrating that the facts of the present year are same as that of A..Y. 2010-11."

3. "Whether on the facts in the circumstances of the case and in law, the Ld CIT(A) has erred in directing the AO to treat the income earned by the assessee from transacting in shares as capital gains and not business income by relying upon his decision in the case of the assessee for AY 2010-1 1 without analyzing the facts pertaining to the transactions in shares for the year under consideration."

4. "Whether on the facts in the circumstances of the case and in law, the Ld CIT(A) has erred in directing the AO to treat the income earned by the assessee from transacting in shares as capital gains and not business income by relying upon his decision in the case of the assessee for AY 2010-11 ignoring the fact that the assessee has carried out voluminous number of transactions in various scripts and the said shares have been bought and sold again and again rendering the classification of the shares as 'stock-in-trade'."

5. ""Whether on the facts in the circumstances of the case and in law, the Ld CIT(A) has erred in directing the AO to treat the income earned by the assessee from transacting in shares as capital gains and not business income without giving a finding of the fact for the year under consideration."

6. The appellant prays that the order of the CIT (Appeals) on the above grounds be set aside and that of the AO be restored".

7. "The appellant craves leave to amend or alter any ground or to submit additional new ground which may be necessary".

3. Brief facts. Since facts are similar, we are referring to facts and figures from A.Y. 2012-13. The facts of the case are that assessee filed return of income on 23.07.2010 by declaring total income of Rs.44,50,9407-. Subsequently, the assessee filed Revised return of income. The return was processed u/s. 143(1) of the Act. Later on, the case was taken up for scrutiny assessment. Notice u/s.143(2) of the Act was issued on 19.09.2013 and duly served upon the assessee. Notice u/s. 142(1) of the Act alongwith questionnaire was also issued and duly served upon the assessee. The assessee is engaged in the business of trading in shares and also engaged in the business of Inter-Corporate deposit, bill discounting and offered business income of Rs.44,27,483/- mainly from brokerage and bill discounting. During the year, the assessee has shown LTCG of Rs.1,78,33,464/- from sale of shares which has been claimed exempted under section 10(38) of the Act. He also claimed Short Term Capital Loss (STCL) of Rs.15,38,418/-. During the course of assessment proceedings,, the assessee was asked to furnish details of short term capital loss, long term capital gain, broker note, and also explain why the income earned by the share transaction should be treated as business income. It was also show caused that why capital gain/loss should not be treated as business income/loss. Assessee's submission has been considered by the AO but the same was not found to be acceptable as considered in the previous years. In this case, in A.Y. 2010-11 the assessee has been treated as engaged in trading of shares. The income therefore is held to be business income and not capital gain as claimed in Return of Income. The facts & legal position in this year in comparison to A.Y. 2010-11 are same. There is no change in facts as well as legal position. In view of detailed discussion in A.Y. 2010-11, in A.Y. 2012-13 also, assessee is held to be engaged in shares trading activity. Accordingly, Long Term Capital Gain at Rs.1,78,33,464/- and Short Term Capital Loss (STCG) of Rs.15,38,418/-was treated as business income.

4. On considering the volume frequency, regularity of share transactions and magnitude of money involved therein, it is observed by the AO that the

assessee is a trader in shares. However, the assessee has not offered his entire income from share transactions as income from business. He declared himself an investor in shares and only a meager part of income from share transactions was declared as income from business. Where there was no delivery of shares in Demat account of the assessee there only he declared income from business otherwise every transaction gave rise to capital gain. In the instant case the assessee declares income from share transactions are as income from capital gain and also income from business and profession. In light of above discussion and as per mandate of para no. 10 of the circular and keeping in mind the observation of Hon'ble Apex Court in the case of CIT Calcutta v. Associated Industrial Development which says that assessee can maintain two portfolio viz. investment portfolio and trading portfolio and that nature of holding of shares either as stock in trade or as investment is best to known to the assessee so he should produce evidence for the purpose. Thus, assessee has failed to put anything on record in order to show two separate portfolios. There are no two portfolios in assessee's case as such. If assessee affirms that he maintains two portfolios one of them generates business income having speculation transactions, then it is not a correct affirmation. In case of speculation transactions asset is not held by the assessee because it was never delivered to him. On the basis of above discussion, the AO took considered view that the assessee does not have separate portfolio for capital assets held by him.

5. In view of the above, AO concluded that the assessee's entire gamut of business activities is filled with financial assets. He appears to be an expert in this business. He does these activities as an individual and also in partnership firms. He is master in this business and plays multiple roles there. In financial asset, he appears to be broker at one place, trader at another and investor at third place. Assessee asserts that he has two portfolios, one contains tax free bonds, deposits, shares held in physical form and delivery based shares purchased through demat account, other is business portfolio which contains shares which were never held by the

assessee. Which had never been delivered to the assessee and assessee earns speculation income from them. The income from shares transaction is not the income from business and from capital gain as claimed by the assessee; rather it is income from business (delivery based transactions) and income from speculative business (non-delivery based transaction). Therefore, the income declared by the assessee as Short Term Capital Loss and Long Term Capital Gains from shares transactions was assessed by the AO as income from business u/s.28 of the Income Tax Act, 1961.

6. Upon assessee's appeal learned CIT(A) granted relief to the assessee placing reliance upon ITAT order in assessee's own case for A.Y. 2010-11.

7. Learned CIT(A) held as under :-

This issue has already been decided in favour of the appellant by the CIT(A)-39, Mumbai in the case of the appellant in Appeal No. CIT(A)-39/IT-03/AC-20(2)/2013-14 for AY 2010-11 dated 31.03.2015. By following earlier decision, it is held that the appellant is an individual carrying on business as inter-corporate finance broker, lender and had dealt in shares, debentures since last so many years. During the year under consideration, the appellant has shown Short Term Capital Loss at Rs.15,38,418/- u/s 111A of the Act and Long Term Capital Gain of Rs.1,78,33,464/- u/s 10(38) of the Act on sale of shares. However, AO in the assessment order treated such capital gains as business income and computed the total income of the appellant accordingly. There is no case of the AO for treating long term capital gains as business income. In view of earlier decision, the same is directed to be assessed as long term capital gains as shown by the appellant. I am of the view that the AO was not justified in treating the income shown by the appellant under the head capital gains both LTCG and STCG/L as business income. In my considered view, there is no reason and ground for the AO to deviate from the past stand of the Department of treating the appellant as an investor in share. Therefore, AO is directed to treat the capital gains of the appellant both long term and short term loss/gain as such treating the appellant as an investor in shares and not as business income. The Grounds of appeal are allowed. This view is also confirmed by the IT AT in ITA No.3661/M/2015 (AY 2010-11) vide order dated 12.04.2017.

8. Against the above order, assessee is in appeal before us.

9. We have heard both the counsel and perused the records.
10. Learned Counsel of the assessee contended that the issue is covered in favour of the assessee by the decision of ITAT in assessee's own case as above. He further submitted that in similar facts in assessee's wife case also the ITAT has declared the issue in favour of the assessee for A.Y. 2010-11 & 2012-13.
11. Per contra, learned Departmental Representative relied upon the order of the Assessing Officer.
12. Upon careful consideration, we find that issue is covered in favour of the assessee in assessee's own case as above. No distinguishing feature has been brought to our note. It is also not the case that Hon'ble Bombay High Court has reversed the ITAT decision. Accordingly, following the precedence from ITAT in assessee's own case we uphold the order of learned CIT(A).
13. Grounds raised in cross objection read as under :-

On the facts and in the circumstances of the case the learned AO/CIT(A) has:-

- 1) erred in reopening the assessment of the Assessee after four years from the end of the relevant assessment year under section 147 of the Act without appreciating that there was no failure on the part of the Assessee in disclosing all material facts during the course of original assessment proceedings; ..*
- 2) erred in reopening the assessment without any tangible material on hand, and initiated reopening only on the basis of a change of opinion, which is bad in law;*
- 3) erred in not granting the IDS credit of Rs. 25,259 even though IDS certificate were submitted by the assessee;*

On the facts and in the circumstances of the case the learned AO has:-

- 4) erred in not accepting the CIT(A)'s order and has filed an appeal before Income Tax Appellate Tribunal;*

14. Learned Counsel of the assessee submitted that he shall not be pressing for the ground raised in cross objection challenging the reopening. Accordingly the ground raised in cross objection is dismissed.

15. Other ground raised in the cross objection is consequential.

16. In the result, appeal by the Revenue and Cross Objection by the assessee stand dismissed.

Order has been pronounced in the Court on 28.3.2019.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 28/3/2019

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Senior Private Secretary)
ITAT, Mumbai

PS