

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.3910/Del./2011
(Assessment Year : 2007-08)**

ACIT, Circle 17 (1),
New Delhi. vs. Shri VIC Enterprises Pvt. Ltd.,
4th Floor, Punjabi Bhawan,
10, Rouse Avenue,
New Delhi.
(PAN : AAACV0132B)

**ITA No.3634/Del./2011
(Assessment Year : 2007-08)**

Shri VIC Enterprises Pvt. Ltd.,
4th Floor, Punjabi Bhawan,
10, Rouse Avenue,
New Delhi. vs. ACIT, Circle 17 (1),
New Delhi.
(PAN : AAACV0132B)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri M.P. Rastogi, Advocate
REVENUE BY : Shri J.K. Mishra, CIT DR

Date of Hearing : 12.09.2019
Date of Order : 01.10.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Present cross appeals filed by the assessee as well as by the Revenue are being disposed off by way of composite order to avoid repetition of discussion.

2. Appellant, ACIT, Circle 17 (1), New Delhi (hereinafter referred to as the 'Revenue') by filing the present appeal being ITA No.3910/Del/2011, sought to set aside the impugned order dated 06.06.2011 passed by the Commissioner of Income - tax (Appeals)-XIX, New Delhi on the grounds inter alia that :-

"1. On the facts and in the circumstances of the case ad in law, the learned CIT(A) erred in deleting the addition of Rs.40,85,049/- by treating the business income as long term capital gains.

2. On the facts and in the circumstances of the case and in law, the learned CIT(A) failed to appreciate that the Memorandum of Association of the assessee company stipulated carrying on business of trading in investment and hence the income derived by such activity was business income.

3. On the facts and in the circumstances of the case and in law, the CIT (A) has failed to appreciate that the case of the assessee squarely falls under the category of speculation business as per Explanation to section 73 of the I. T. Act, 1961 as the business of the assessee is trading in sale/purchase of mutual funds. This is without prejudice to the other grounds of appeal as agitated above.

4. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in deleting the addition of Rs.5,71,780/- on account of interest without appreciating that loans/advances were granted for non business purposes."

3. Appellant, M/s. VIC Enterprises Pvt. Ltd. (hereinafter referred to as the 'assessee') by filing the present appeal being ITA No.3634/Del/2011, sought to set aside the impugned order dated 06.06.2011 passed by the Commissioner of Income - tax (Appeals)-XIX, New Delhi on the grounds inter alia that :-

"1. Because the action is under challenge on facts and law in declining the claim for the Investment Activity relating to shares treating the same as Business Income which is not in accordance

with the Regularly Followed Method of Accounting substantiated by the Audited Financial Statement.

2. Because the action is under challenge on facts and law for having treated the Gains Accrued on Disposal of Shares amounting to Rs.2,75,11,065/- as Business Income whereas per the assessee the same is Short Term Capital Gain Chargeable to tax u/s 111A.

3. Because the action is under challenge having overlooked & ignored the CBDT circular No. 4/2007 Dt. 15.06.2007 in terms of which the Gain arising on account of disposal of shares held as Investment are liable to be taxed under the head Capital Gain and the decision of the CIT(A) in the likely placed other cases.

4. Because the action is under challenge on facts and law having followed the Hon'ble Delhi High Court overlooking the facts of said case.

5. Because the action is under challenge on facts and law in making an addition of Rs.7,54,488/- on account of STT paid ignoring the fact that the appellant already disallowed the expenses in Computation of Income.”

4. Briefly stated the facts necessary for adjudication of the issue at hand are : Assessee filed return of income at Rs.2,67,34,667/- by making tax at special rate under section 111A of the Income-tax Act, 1961 (for short 'the Act'). Assessee declared income from long term/short term capital gains and income from business and profession. Assessee also claimed loss on speculative/derivative transactions. Assessee has claimed special rate of tax prescribed u/s 111A of the Act @ 10% of the gain qua the short-term capital gain of Rs.2,75,11,065/-. Declining the contentions raised by the assessee, Assessing Officer (AO) made addition of Rs.2,75,11,065/- due to non-furnishing of

explanation sought for by the AO and by following reasons recorded in the assessment order passed for AYs 2005-06 & 2006-07 treated the short term capital gain shown by the assessee as business income. AO also made addition of Rs.7,54,488/- on account of Securities Transaction Tax (STT) on failure of the assessee to reconcile the STT paid on purchases as well as on sale of shares that the rate of STT applicable qua the concerned transactions.

5. Assessee carried the matter by way of an appeal before the Id. CIT (A) who has partly allowed the appeal. Feeling aggrieved, the Revenue as well as the assessee has come up before the Tribunal by way of filing the present cross appeals.

6. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

7. Since the tax effect in the appeal filed by the Revenue is low i.e. less than Rs.50,00,000/-, in view of the CBDT Circular No.17/2019 dated 8th August, 2019 which is applicable retrospectively in view of the decision rendered by coordinate Bench of the Tribunal in case of *Dinesh Madhavlal Patel [TS-469-ITAT-2019(Ahd)] 2019-TIOL-1556-ITAT-AHM dated 14th*

August, 2019, the appeal of the Revenue being ITA No.3910/Del/2011 is dismissed on account of low tax effect.

8. However, in view of the grounds raised by the assessee, the assessee's appeal being ITA No.3634/Del/2011 is being disposed off on merits.

ITA No.3634/Del/2011 (ASSESSEE'S APPEAL)

GROUND NO.1, 2, 3 & 4

9. Undisputedly, Assessing Officer as well as Id. CIT (A) have made/confirmed the addition of Rs.2,75,11,065/- by treating the same as business income otherwise claimed by the assessee as gain accrued on disposal of shares chargeable to tax u/s 111A of the Act, by following their own order passed in AY 2005-06.

10. The Id. AR for the assessee contended that the issue in controversy is covered by the order passed by the *coordinate Bench of the Tribunal in ITA No.2863/Del/2010 for AY 2006-07 order dated 22.12.2015 in assessee's own case* which fact has not been controverted by the Id. DR for the Revenue by placing on record material if the order relied upon by the Id. AR has been overruled or lying challenged before the higher appellate authority.

11. Coordinate Bench of the Tribunal determined the issue in controversy in favour of the assessee in assessee's own case in AY 2006-07 (supra) by returning following findings :-

“25. Ground Nos. 1 and 2: Similar arguments have been adopted by the parties as advanced by them hereinabove on the issue of long term capital gain raised in the appeal preferred by the Revenue. The authorities below have treated the claimed short term capital gain of Rs.6,23,34,129 accrued on disposal of shares invested for a short term period as business income. The assessee had also claimed benefit under sec. 111A of the Act on the said short term capital gain.

26. The assessee had furnished list of shares and the number of scripts involved as 170. It had claimed short term capital gain of Rs.6,71,16,180 and loss of Rs.47,82,051 thus the net gain was claimed at Rs.6,23,34,129. The assessee had classified the gains into long term and short term, after taking into consideration the period of holding of shares. The Assessing Officer did not agree with the claim of the assessee on the basis that the number of shares and frequency of transactions were in the nature of regular business activities. He held that assessee had done the same with a motive to maximize the profits immediately rather than holding them as investment. We do not agree with such approach of the Assessing Officer as earning of maximum profit is the object of the assessee in both type of transactions i.e. investment and trade, hence, it cannot be a sole criteria to test the nature of the transaction. If the assessee has sold a share within a short term period after purchase but the intention of the assessee behind the same remained investment still the gain will be treated as short term capital gain. The contention of the assessee remained that these shares were also purchased with intention to invest therein details of which has been made available at page No.142 to 146 of the paper book. In the details, the period of holding has been shown less than or equal to sixty days with all the other details as well as STT paid on the transaction.

26.1 Both the Ld AO and learned CIT(A) have erred in treating the income from sale of STT Paid listed equity shares from Short term capital gains to business income. It can be seen that the assessee is primarily an investor in shares. From the ratio of sale of income from shares, 84% of the income is determined from long term holding of STT paid listed equity shares. Only a small component 15% of income from shares is treated as short term. A look into the holding period of shares Appendix B would reveal that out of 560 scripts, the transactions pertained only to 60- 65 scripts which were sold in at different times. 409 scripts out of 560 total scripts has a holding period of more than 60 days having a short term capital gain of Rs 5.13 crores out of Rs 6.23crores, only Rs 1.09 crores were earned from 151 scripts having a holding period of 15-60 days barring few which are than 10 days. Thus, the Appellant states that when shares are acquired after paying STT and taking complete delivery of shares

keeping a long term in view as 84% of shares are held for more than one year, transacting in some shares in short term to alter its investment vision and goal cannot be considered as an action borne out to do trade. It happens when the vision is long term, some shares thought purchased are dropped out from portfolio either because sufficient funds are not available to make them reach to a level to accumulate capital or because of some other allied reasons.

26.2 It is not the finding of the Assessing Officer or the Learned CIT(Appeals) that these shares were shown as stock in trade or the assessee was not correct in showing these shares as investment. We thus do not find infirmity in the claim of the assessee that the profit accrued on sale of these shares was short term capital gain and the assessee was eligible for claiming charging of the gain under the provisions laid down under sec. 111A of the Act. We thus while setting aside the orders of the authorities below in this regard direct the Assessing Officer to accept the claim of the assessee and allow the benefit of charging of the gain under sec. 111A of the Act. The ground Nos. 1 and 2 are accordingly allowed.”

12. Following the decision rendered by coordinate Bench of the Tribunal for AY 2006-07 (supra) as per findings extracted herein before, we are of the considered view that the assessee is entitled for claiming/charging of gains under the provisions contained u/s 111A of the Act, consequently the issue is set aside to the AO to accept the claim of the assessee by giving benefit of charging of short term capital gain to tax u/s 111A of the Act after due verification. Consequently, grounds no.1, 2, 3 & 4 are determined in favour of the assessee.

GROUND NO.5

13. AO made addition of Rs.7,54,488/- on account of STT paid on the ground that the assessee has not filed certificate from

NSE/BSE in respect of STT paid and thereby denied the credit of Rs.7,54,488/- to the assessee. The Id. CIT (A) confirmed the addition by passing a cryptic order by returning following findings:-

“28. Ground No.14 reads as under :

“The Ld. Addl. Commissioner of Income Tax erred in making an addition of Rs.7,54,488/- on account of SIT paid ignoring the fact the appellant already disallowed the expense in its computation of income. Full arguments will be advanced at the time hearing.”

29. Vide this ground the assessee challenged the action of the AO in adding back STT paid of Rs.7,54,488/-.

30. The AR filed detailed written submissions, in this regard which are as under:

“Regarding SIT paid of Rs.754488/- it is to mention that the Appellant itself added back the SIT paid amounting to Rs.754488/-. Further adding back the same expense which has already been added back in the income of the appellant, is not correct, hence it requires deletion.”

31. It is seen that while working out disallowance u/s 14A the assessee has taken credit for STT paid. Hence, the addition of Rs.7,54,488/- is upheld.

Accordingly, Ground No.14 is dismissed.”

14. It is categoric case of the assessee that when the assessee himself has added back the STT paid amounting to Rs.7,54,488/- by disallowing the expenses in its computation of income, the addition is not sustainable. But AO as well as Id. CIT (A) have dealt with the issue without looking into the facts pleaded by the assessee. So, the issue is set aside to the AO to decide accordingly

in view of the stand taken by the assessee and on the basis of computation of income filed by the assessee after providing adequate opportunity of being heard to the assessee. Consequently, Ground No.5 is determined in favour of the assessee for statistical purposes.

15. Resultantly, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in open court on this 1st day of September, 2019.

**Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 1st day of October, 2019
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-XIX, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**