

आयकर अपीलिय अधीकरण, न्यायपीठ – “SMC” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH: KOLKATA
(समक्ष श्री ए.टी. वर्की, न्यायिक सदस्य)

[Before Shri A. T. Varkey, JM]

I.T.A. No. 1690/Kol/2019
Assessment Year: 2012-13

Harish Kumar Biyani.	Vs.	ACIT, Circle-34, Kolkata.
(PAN: AFJPB 4085 N)		
Appellant		Respondent

For the Appellant	Sh. Anil Kochar, Adv.
For the Respondent	Sh. Jayanta Khanra, JCIT, Sr. DR

Date of Hearing	28.11.2019
Date of Pronouncement	17.01.2020

ORDER

Per Shri A.T.Varkey, JM:

This is an appeal preferred by the assessee against the order of the CIT(A)-10, Kolkata dated 20.06.2019 u/s 250 of the Income Tax Act, 1961 (hereinafter ‘the Act’) for Assessment Year (hereinafter ‘AY’) 2012-13.

2. The main grievance of the assessee is against the action of the Id. CIT(A) in not allowing the assessee’s claim of short term capital loss of ₹46,35,928/- which the assessee claimed to have occurred on sale of shares of M/s. Titan Industries Ltd. (hereinafter M/s. TIL) and against the action of the Id. CIT(A) in confirming the addition of ₹2,99,509/- on this transaction.

3. Brief facts of the case as noted by the AO is that the assessee is engaged in the business of trading in shares, share derivatives and currency derivatives. Since the assessee had claimed short term capital loss of ₹46,35,928/- and consequently the claim of loss had to be carried forward, the AO asked for the details of the loss claimed by the assessee. According to the AO, the assessee submitted the details as

per which it discerned that the assessee had purchased 19500 shares of M/s. TIL during the period between 26.10.2010 to 02.05.2011 for a total consideration of ₹96,70,974/- and sold the same during the period between 22.09.2011 to 20.03.2012 for a sum of ₹52,34,946/- resulting in loss of ₹46,35,928/-. According to the AO from the details given by the assessee it was noted that the assessee had bunched the purchase transactions on different dates and did not specify the rate of scrip purchased on different dates. So the AO asked the assessee to file the copies of the contract notes in respect of purchase and sales of these shares and also asked to explain the reasons for treating the transactions in the shares of M/s. TIL on capital account, when the transactions in all other shares are on trading account. The AO also asked the assessee to file details of investments shown in balance sheet as on 31.03.2011 and also on 31.03.2012. The AO also mentioned in the assessment order that the assessee sold shares amounting to ₹1,17,71,947/- during the relevant assessment year other than the shares of M/s. TIL which were all treated as on trading account. The AO notes that pursuant to the notice, the assessee had filed a list of shares shown under the "Investments" as on 31.03.2011 and as on 31.03.2012 totalling to ₹65,29,478/- and ₹78,63,614/- respectively. Thereafter the AO records in para 5 which is as under:

"5. It may be mentioned that the name of Titan Industries Ltd. was changed to Titan Company Ltd. in Aug. 2013. The assessee has not declared sale of shares of any other company as on capital account. The assessee filed details of shares purchased by him for trading purposes and for investment purposes vide letter dated 15.11.2014. As per these details, shares of Titan Ind. Ltd. purchased from 6.4.2011 to 23.05.2011 have been declared as for trading purposes and shares of Titan Ind. Ltd. purchased from 23.05.2011 to 28.03.2012 have been declared as for investment purposes. It proves the intention of the assessee that only shares purchased for trading purposes were sold during the year because as per assessee's own admission, shares purchased from 26.10.2010 to 2.5.2011 were sold during the year. The reason for two different treatments for same scrip becomes clear when one considers the fact there was a bonus declaration in this scrip in the ratio of 1:1 on 23.06.2011 and the assessee changed categorization of these shares after this date only to take benefit of section 55(2)(aa) of the I.T. Act which allows him to take entire cost of the shares on shares sold by him if only part of shares are sold although bonus declaration automatically leads to corresponding fall in price of share in the market. This approach would have been legal had the intention of the assessee from the beginning would have been to purchase these shares as investment and not as stock but that is not the case as mentioned above. In the present case, it is proved that shares of Titan Ind. Ltd. were purchased as part of stock only and the assessee cannot change this categorization subsequently on declaration of bonus. Apart from this, the details of investment as on 31.03.2011 does not include shares of Titan Industries Ltd. although as per the details of purchases filed by the assessee for short term capital loss, purchases of shares of this company amounted to Rs.

56,21,046/- from the period 26.10.2010 to 31.03.2011 and purchases of Rs. 42,49,828/- from 1.4.2011 to 2.5.2011, totalling to Rs. 98,70,874/-. Thus, if the intention of the assessee was to purchase these shares as 'Investment' and not as 'Stock-in-trade', it would have categorized it as investment in the balance sheet as on 31.03.2011 which was not done although that in itself would not have been a conclusive evidence of it being an investment and not stock, it proves the intention of the assessee that these shares were purchased as stock and included in the value of stock-in-trade in the balance sheet as on 31.03.2011."

4. Thereafter the AO was of the opinion that the shares of M/s. TIL has been purchased by the assessee as stock in trade because the assessee has not filed any evidence in the form of copy of demat account which can prove that the shares of M/s. TIL was held on capital account (investment and not trading). Thereafter the AO treated the sale of shares of M/s. TIL as on trading account and applying the weighted average computed profit on sale of shares of M/s. TIL at ₹2,99,509/- instead of the claim made by the assessee of short term loss of ₹46,35,928/-.

5. Aggrieved, the assessee preferred an appeal before the Id. CIT(A) who confirmed the same.

6. Aggrieved, the assessee is before me.

7. Having heard both the parties it is noted that the assessee is dealing in shares and maintaining two separate accounts for investment and trading. There is no dispute in respect of the income of the assessee arising from his trading account which has been treated as "business income". The only dispute is regarding the claim of the assessee that he has incurred short term capital loss arising from the sale of shares of M/s. TIL. According to the assessee he has sold the shares of M/s. TIL which he has inherited from his Late father Om Shankar Biyani who expired on 10.07.2011. [The Late father of the assessee had bequeathed all the assets movable and immovable to assessee as per the Probate granted by the Court of Dist. Delegate, Alipore]. According to the assessee, the assets so bequeathed included shares of M/s. TIL and these were treated as investments by the assessee. According to the assessee, the shares of M/s. Titan Industries were split from the face value of ₹10/- to ₹1/- on 23.06.2011 i.e., before the death of father of the appellant and also on the same date Bonus shares were issued in the proportion of 1:1 and this resulted in holding of

117000 shares by Late Om Shankar Biyani. It was brought to my notice that the appellant had received the entire holding of 117000 shares upon the death of his father. And according to ld. AR, the inference drawn by the A.O. with regard to the split up of the shares as well as consequent issue of bonus shares as having been done by the appellant with regard to his holding is devoid of any reasoning as because the split up and the consequent bonus as explained earlier were done much prior to the assessee inheriting those shares. It was pointed out by the ld. AR that the appellant in fact sold 26,000 shares and not 19,500 as stated by the A.O. in the order of assessment during the year for a total consideration of ₹52,34,946/- and the cost of the same being ₹98,70,874/- as appearing in the Books of Late Om Shankar Biyani from whom the aforesaid shares were inherited. This transaction, according to ld AR therefore, resulted in Short Term Capital loss of ₹46,35,928/- (₹98,70,874/- minus ₹52,34,945/-) which was claimed by the appellant. It is noted that the A.O., however, has taken the sale consideration of 26,000 shares at a consideration of ₹52,34,946/- but while deducting the cost of purchase of the above shares has deducted the value of 975 shares pre-split and pre bonus and thereby calculating the alleged profit and made the addition of ₹2,99,509/-.

8. Therefore, according to the ld. AR, the AO as well as the ld. CIT(A) has misconstrued the facts of the case and has proceeded arbitrarily in treating the short term capital loss claimed by the assessee/appellant and in turn erroneously determined the income of the assessee at ₹2,99,509/-.

9. Per contra, the ld. DR supporting the order of the ld. CIT(A) contended that the assessee was a dealer in shares as well as holding certain shares in investment portfolio. And according to the ld. DR if the intention of the assessee was to hold these shares as investment and not as stock in trade, it should have been categorized as investment in the balance sheet on 31.03.2011 which has not been done as noted by the ld. CIT(A). The ld. CIT(A) according to him has observed that the assessee has not been able to rebut the finding of the AO in this respect and has not filed any document by way of relevant balance sheet etc. to support his case that the shares were held as investment and not as stock in trade. So, according to the ld. DR since the assessee

failed to show before the AO that the shares of M/s. TIL was held as investments by his Late father when he initially purchased it ; and according to him, it is not discernable as to whether the assessee had also continued treating the same after inheritance as investment these shares. So in the absence of evidence, the AO had no other alternative but to treat the consideration from sale of M/s. TIL as business income and the assessee's claim of capital gain/loss on the sale of the shares of M/s. TIL could not be allowed and therefore he does not want me to interfere.

10. After hearing both the parties I note that the assessee had inherited the movable and immovable assets of his father Late Om Shankar Biyani who expired on 10.07.2011. According to the Id. AR, the assessee had inherited shares and debenture of ₹7,70,38,512/- which is shown as investment. According to the Id. AR, Late Om Shankar Biyani had invested in shares of M/s. TIL which were duly reflected in the demat account maintained by him and as on the date of death he possessed 117000 shares of M/s. TIL which are appearing in his demat account as under:-

“Qty. (Nos.) Demat Details

114200 A/c No.120538000000994 - Sankalp Share Brokers (P) Ltd.

2800 A/c No.10048575 - Trans Scan Securities (P) Ltd.

Out of the total 117000 quantity of shares thus inherited by the appellant as per his father's WILL and Nomination, appellant disposed off 26000 shares and incurred Short Term Capital Loss of Rs.46,35,928/-.”

11. However it was pointed out by the Id. AR that the AO has wrongly taken the figure as 19500 shares whereas actual sale of shares of M/s. TIL was of 26000 shares. The AO has not accepted the assessee's claim that he was holding those shares (M/s. TIL) in the capital account and therefore he was of the opinion that the transaction should be treated as business transaction (Trading account); and he did not accept the claim of the assessee to take the benefit of Section 55(2)(aa) of the Act. I note that the number of shares sold by the assessee is 26000 and not 19500 as erroneously found by the AO and confirmed by the Id. CIT(A). The short question to be solved is whether the inherited shares of M/s. TIL by the assessee from his father Late Om Shankar Biyani should be treated as “investment” or as “stock in trade”. For that I note that the factual findings recorded by the AO are not clear finding of fact. Therefore, I am

inclined to set aside the order of the Id. CIT(A) and remand the issue back to the file of the AO with a direction first of all to record a clear finding as to whether the father of the assessee Late Om Shankar Biyani had maintained two portfolios one of “investment” and the other of “trading”. Second question is whether the father of the assessee had shown the shares of M/s. TIL which were sold by the assessee as investment in his separate demat account/portfolio/books of accounts and if the finding of fact is that the assessee’s father had purchased the shares of M/s. TIL and reflected the same as investment which has been inherited by the assessee, and have been sold, then the benefit of Section 55(2)(aa) need to be given. After carrying out the exercises as stated above, the AO is directed to compute the capital gain/loss u/s 45, 55(2)(aa) of the Act r.w. Board’s Circular No. 6/2016 on this issue to compute the income in accordance with law and not to be influenced by the finding given by his predecessor AO and the Id. CIT(A).

12. Ground no. 6 is against the action of the Id. CIT(A) confirming the addition of ₹78,750/-. Brief facts of the case is that the AO noted that the assessee had shown to own a commercial space no. 1502, Gali Anarwali, Farash Khana, Delhi-110 006 which was purchased for a sum of ₹18,02,000/- on 12.10.2011. Since no rental income was returned by the assessee, the AO confronted him, then according to the AO the assessee had replied that this property was not used (‘empty’) property. Taking note that the assessee has not used the property in question for $4\frac{1}{2}$ months, the AO invoked Section 22 of the Act to compute the notional rent and estimated it at ₹25,000/- per month and after giving standard deduction of 30%, he made an addition of ₹78,750/-. On appeal the Id. CIT(A) confirmed the addition. However, the Id. CIT(A) noted while confirming the addition that the assessee had submitted before him that the said property was kept for the purpose of business though no business could be commenced in this area and therefore notional rent was not applicable as per law. However, the Id. CIT(A) observed that this contention was not offered by the assessee before the AO and that was not supported by any documents. Therefore he refrained from interfering with addition made by the AO. So it is noted from the observation made by the Id. CIT(A) that during assessment stage since the assessee did not get

proper opportunity before the AO the notional rent has been saddled on the assessee, therefore, I deem it fit to remand this issue also back to the AO for *de novo* adjudication after hearing the assessee.

13. The next grievance is against the Id. CIT(A) in confirming the addition of ₹2,60,955/- made by the AO u/s 69C of the Act. Brief facts is that the assessee had declared withdrawal for household expenses at ₹1,59,045/- in his balance sheet. According to the AO this is very low keeping in view the standard of living of the assessee. So according to him the assessee has made his household expenses from undisclosed sources. Therefore he estimated the household expenses at ₹35,000/- per month and made an addition of ₹2,60,955/- u/s 69C of the Act. According to the Id. AR, the AO never confronted the assessee in respect of his suspicion that the assessee has drawn less money for his household expenses. Without confronting the assessee, the AO has estimated the addition based on suspicion & conjecture. So, I deem it fit to remand this issue also back to the file of the AO for *de novo* adjudication and direct the AO to give proper opportunity to the assessee before making any addition on this issue. Thus the impugned order of the Id. CIT(A) is set aside and the three issues discussed (*supra*) are remanded back to AO for fresh assessment, after giving proper opportunity to assessee and as discussed (*supra*).

14. In the result, the appeal of the assessee is allowed for statistical purposes.

Order is pronounced in the open court on 17th January, 2020.

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 17th January, 2020

Copy of the order forwarded to:

1. Appellant – Harish Kumar Biyani, 138, Canning Street, Kolkata-700 001.
2. Respondent – ACIT, Circle-34, Kolkata.
3. CIT(A)-10, Kolkata. (sent through e-mail)
4. CIT
5. DR, Kolkata Benches, Kolkata. (sent through e-mail)

/True Copy,

By order,

Assistant Registrar
ITAT, Kolkata Bench