

आयकर अपीलीय अधिकरण, दिल्ली न्यायपीठ "जी", नई दिल्ली में

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI**

सुश्री सुषमा चावला, उपाध्यक्ष एवं डॉ. बी आर आर कुमार, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, V.P & DR. B.R.R. KUMAR, A.M.

आयकर अपील सं. / ITA No. 2807/Del/2011

निर्धारण वर्ष / Assessment Year: 2006-07

The DCIT,
Circle-7(1), Room No.312,
3rd Floor, C.R.Building,
I.P.Estate, New Delhi.

.....अपीलार्थी/Appellant

vs

M/s. Sak Industries Ltd.,
Chandiwala Estate,
Maa Anand Mai Marg, Kalkaji,
New Delhi.
PAN-AAGCS3326Q

..... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 2861/Del/2011

निर्धारण वर्ष / Assessment Year: 2006-07

M/s. Sak Industries Ltd.,
B-1, Gulmohar Park,
New Delhi-110049.
PAN-AAGCS3326Q

.....अपीलार्थी/Appellant

vs

The ACIT,
Circle-7(1), New Delhi.

..... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by: Sh. Saras Kumar, Sr. DR

प्रत्यर्थी की ओर से / Respondent by: Sh. Rohit Jain, Adv. & Ms. Shailey Gupta, CA

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| सुनवाई की तारीख / Date of Hearing : 06.01.2020 | घोषणा की तारीख / Date of Pronouncement: 12.03.2020 |
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आदेश / ORDER

PER SUSHMA CHOWLA, VP

The present cross appeal filed by Revenue and the assessee is against order of CIT(A)-X, New Delhi dated 14.02.2011 relating to assessment year 2006-07 against the order passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act').

2. The Revenue and the assessee have raised following grounds in this appeal:-

आयकर अपील सं. / ITA No. 2807/Del/2011

निर्धारण वर्ष / Assessment Year: 2006-07

1. "On the facts and circumstances of the case the Ld.CIT(A) erred in law and on facts of the case in treating the income of Rs.22261306/- as short term capital gains and not as business income as treated by the Assessing Officer.
2. On the facts and circumstances of the case the Ld.CIT(A) erred in law and on facts of the case in directing to treat enhanced by him of Rs.2002285/- u/s 94(7) and Rs.965493/- (STT paid) as short term capital gains instead of business income.
3. On the facts and circumstances of the case the Ld.CIT(A) erred in law and on merit of the case in deleting the disallowance of Rs1626200/- made by the Assessing Officer on account of diversion of borrowed funds.
4. On the facts and circumstances of the case the Ld.CIT(A) erred in law and merit of the case in giving a relief of Rs.3919162/- out of total addition of Rs.5049639/- made by the Assessing Officer u/s 14A by applying Rule 8D."

आयकर अपील सं. / ITA No. 2861/Del/2011

निर्धारण वर्ष / Assessment Year: 2006-07

1. “That the order of learned CIT(A) partly sustaining the order of the learned Assessing Officer is bad in law and on facts and is liable to be set aside.
2. The learned CIT(A) has erred in law and on facts in confirming the action of Ld.AO in considering short term capital gain of Rs.44,37,140/- as business income.
3. That the learned CIT(A) has erred in law and on facts in making an addition to the short term capital gain on mutual funds units by Rs.29,67,778/-.
4. That the learned CIT(A) has erred in law and on facts in disallowing Rs.11,30,477/- u/s 14A of the Income tax Act, 1961 out of dividend income in addition to Rs.14,48,604/- disallowed by the appellant in computation of income.”
3. Ground of appeal No.1 raised by the assessee is general in nature hence, the same is dismissed.
4. Ground of appeal Nos. 3 & 5 raised by the assessee are not pressed and the same are dismissed.
5. Ground of appeal No.2 raised by the assessee which is against the action of authorities below in holding the short term capital gain of Rs.44,37,140/- as business income of the assessee.
6. Briefly in the facts of the case the assessee was incorporated in 1962 and as per its Memorandum of Association, had authorized its Directors to invest surplus funds and securities. The investment made in shares were shown as capital asset and were disclosed as balance sheet as investment in capital

asset. The assessee company had not borrowed funds for the aforesaid investment. The assessee at the end of the year had valued the capital asset at cost as against the trading asset which were to be valued at cost or market price, whichever is less. The assessee upto Assessment Year 2004-05 had consistently followed the said principle and the surplus was declared by the assessee as capital gain, which were accepted by the Revenue authorities. In Assessment Year 2005-06, the AO treated the said income as business income as against capital gains income shown by the assessee. Further, the CIT(A) held the assessee to be an investor and not dealer in shares. The assessee was also investing in mutual funds. However, in Assessment Year 2006-07, i.e year under appeal the surplus shown by the assessee was held to be business income and not capital gains. The Assessing Officer and the CIT(A) observed that the short term investment made by the assessee on which no dividend was clearly business transaction undertaken by the assessee with the intention of earn profits from their sale. Accordingly, short term capital gain shown at equity funds of Rs.2,66,95,852/- was held to be taxable as business income in the hands of the assessee @ 30%. The long term capital gain shown on sale of equity funds was accepted as such and was not treated as business income. Similarly, both the long term capital gain and short term capital gain shown by the assessee on debt funds was accepted as such by the AO.

7. The CIT(A) after elaborating, going through the portfolios and the method of operation of the assessee, held that the assessee was holding two types of shares which was in the nature of "stock in trade" and units of mutual

funds which were in the nature of “investments”. The CIT(A) did not agree with the contention of the assessee that both these portfolios were “investments”. Vide para 2.38 at page 36 of the appellate order, the CIT(A) held that the gains arising on transaction of mutual funds (equity oriented) of Rs.2,32,26,799/- to the extent of (Rs.2,22,61,306/- + Rs.9,65,493/-) was income from capital gains. The AO was further directed to add STT paid of Rs.9,65,493/- and disallow loss of Rs.20,02,285/- u/s 94(7) of the Act. The CIT(A) concluded that the treatment of short term capital gains on sale of shares of Rs.44,37,140/- was to be treated as business income in the hands of the assessee. The conclusion is mentioned vide para 2.46 at pages 40 & 41 of the appellate order.

8. The assessee is in appeal against the order of the CIT(A) in considering the short term capital gain of Rs.44,37,140/- as business income before us.

9. The case of the assessee before us is that the investment had been made by the assessee company in its subsidiaries companies. However, out of surplus, it was making investment in mutual funds and shares for which, no borrowed funds were utilized and the investment time and again had been shown as capital assets. Our attention was drawn to the declaration made in the balance sheet in this regard and it was pointed out that same method has been followed from year to year and the income shown by the assessee should be assessed under the head “capital gains”.

10. The Ld.DR for the Revenue placed reliance on the orders of the authorities below.

11. We have heard the rival contentions and perused the record. The issue which arises vide Ground No.2 is against the treatment of capital gain shown by the assessee on sale of shares on short term basis. The capital gain earned on shares which were held for more than 12 months i.e. long term assets was held to be income from capital gains. However, the gain on short term basis was held to be business income by the authorities below. The assessee is in existence in 1962 and after making investment in its subsidiaries companies, it has been making the investment in mutual funds and shares out of the surplus income. The Assessing Officer had treated both the capital gains arising on sale of investment on mutual funds and shares as business income in the hands of the assessee. However, the CIT(A) held that the capital gain arising on mutual funds was to be assessed @ 10% in the hands of the assessee and capital gain arising on sale of shares on short term basis was to be assessed as business income.

12. The assessee is in appeal against the treatment of short term gains and the Revenue is in appeal vide Ground No.1 against the assessment of gain arising on sale of mutual funds @ 10%.

13. On perusal of the order of the CIT(A), who has elaborately considered the investment made by the assessee with regard to the mutual funds, we find no merit in Ground No.1 raised by the Revenue where the investment has time and again shown as capital assets in the hands of the assessee. It may also be noted that one of the objects of the assessee company was to invest its surplus

in shares and mutual funds. The Revenue has failed to controvert the findings of CIT(A) hence, Ground No.1 raised by Revenue is dismissed.

14. Now coming to the second aspect of the issue i.e. shares held by the assessee on short term basis. The assessee had invested in the shares, where some shares were held on long term basis and some on short term basis. The said investment has been made over the period of years and the income declared by the assessee has been accepted from year to year. In such a scenario where there is no change in facts, the position accepted in the hands of the assessee should not be disturbed merely because the shares were held for a short term period i.e equity funds, cannot be segregated to be business income in the hands of the assessee. The shares on all debt funds both on long term and short term basis were assessed as capital gains in the hands of the assessee. Accordingly, we find no merit in holding that the income from sale of shares in short term basis is to be assessed as business income in the hands of the assessee. We reverse the orders of CIT(A) in this regard and direct the Assessing Officer to assess the same as income from capital gains. Thus, Ground No.2 raised by the assessee is allowed and Ground No.1 raised by the Revenue is dismissed.

15. The issue raised in Ground No.4 by the assessee is against the disallowance made in the hands of the assessee u/s 14A of the Act.

16. In the facts and circumstances of the present case, the total dividend earned by the assessee was Rs.4.22 crores, out of which the disallowance u/s

14A of the Act was made at Rs.11,30,477/-, which were in addition to Rs.14,48,604/- disallowed by the assessee in its computation of income.

17. The Ld.AR for the assessee pointed out that the provisions of Rule 8D are not applicable for the year under consideration. The AO had made the disallowance under Rule 8D which was restricted by the CIT(A) to Rs.11,30,477/- on the ground that Rule 8D was not applicable. He fairly pointed out that the investment was through PMS and the said PMS charges were *suo motto* disallowed by the assessee.

18. In the entirety of the facts and circumstances, we are of the view that sum of Rs.5 Lacs to be disallowed u/s 14A of the Act. Thus, Ground No.4 raised by the assessee is partly allowed.

19. Next issue in Ground No.2 raised by the Revenue is against treatment of income of Rs.20,02,285/- u/s 94(7) of the Act and Rs.9,65,493/- (STT paid) as short term capital gains instead of business income. While deciding Ground No.2 of the assessee, we have held that even gain on short term basis is to be assessed as capital gain and following the same parity of reasoning, we find no merit in Ground No.2 raised by the Revenue and the same is dismissed.

20. Now, coming to the Ground No.3 raised by the Revenue against the disallowance made u/s 36(1)(iii) of the Act. The AO was made disallowance of Rs.16,26,200/- on account of diversion of borrowed funds.

21. The CIT(A) deleted the said disallowance on the ground that the assessee had surplus own funds and hence, there was no merit in the said disallowance vide para 3.3 of the appellate order. The Revenue has failed to controvert the findings of the CIT(A) hence, there is no merit in Ground No.3 raised by the Revenue which is dismissed.

22. Next issue vide Ground No.4 raised by the Revenue is linked to Ground No.4 raised by the assessee and we have already held that there is no merit in the order of the AO in applying the provision of Rule 8D which are to be applied from Assessment Year 2008-09. The CIT(A) in such circumstances, held that the working of disallowance under Rule 6D of Income tax Rules by Assessing Officer is incorrect. Accordingly, we find no merit in the Ground No.4 raised by the Revenue and the same is dismissed.

23. In the result, the appeal of the Revenue is dismissed and the appeal of the assessee is partly allowed.

Order pronounced in the open court on 12th March, 2020.

Sd/-

(DR. B.R.R. KUMAR)
लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(SUSHMA CHOWLA)
उपाध्यक्ष/VICE PRESIDENT

दिल्ली / दिनांक Dated : 12th March, 2020

** Amit Kumar **

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. मुख्य आयकर आयुक्त / The Pr. CIT
- 5.
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

Assistant Registrar, ITAT, Delhi