

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : D : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.4414/Del/2014
Assessment Year: 2010-11

Talkatora Investment & Trading Co. Vs ACIT,
Pvt. Ltd., Circle-16(1),
54, Ring Road, New Delhi.
Lajpat Nagar-III,
New Delhi.

PAN: AA ACT3012G

(Appellant)

(Respondent)

Assessee by : Shri Rohit Jain, Advocate,
Shri Deepashree Rao, CA &
Shri Vibhu Gupta, CA
Revenue by : Shri R.K. Gupta, Sr. DR
Date of Hearing : 24.09.2020
Date of Pronouncement : 30.09.2020

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 31.03.2014 of the CIT(A)-19, New Delhi, relating to assessment year 2010-11.

2. The ground of appeal number 1 by the assessee reads as under:-

01. That the Commissioner of Income Tax (Appeals) erred on facts and in law in holding that the legal and travelling expenses incurred by the appellant wholly and exclusively in connection with the transfer of shares held and transferred by it and claimed against income chargeable under the head "Capital Gains" as not acceptable and hence not allowable.

3. Facts of the case, in brief, are that the assessee is a company and derives income from sale and purchase of shares. It filed its return of income on 30th March, 2011 declaring the total income at Rs.6,37,34,020/-. The AO, during the course of assessment proceedings, noted that the assessee has shown income from long term capital gain amounting to Rs.12,92,42,065/- and has claimed deduction under section 54EC of Rs.50 lacs. According to the AO, the duration of holding of such shares was less than 12 months and, therefore, it was short-term capital gain and, consequently, the assessee is not entitled to claim this as long-term capital gain and, therefore, no benefit under section 54EC can be allowed to the assessee. In view of the above, the AO treated the long-term capital gain declared by the assessee as short-term capital gain and denied benefit of deduction under section 54EC.

4. In appeal, the Id. CIT(A) accepted the plea of the assessee that such gain on sales of shares is long-term capital gain and the assessee is entitled to deduction under section 54EC. However, the expenses claimed on sale of such shares to the extent of Rs.1,69,18,142/- on account of litigation and travelling expenses was rejected by him on the ground that the assessee could not substantiate the incurring

of such expenses. He accordingly rejected the claim of the expenses to the tune of 1,69,18,142/-.

5. Aggrieved with such order of the CIT(A), the assessee is an appeal before the Tribunal.

6. The ld. counsel for the assessee strongly challenged the order of the CIT(A) in rejecting the claim of such expenditure which was specifically incurred for sale of such shares. He submitted that the ld.CIT(A) for the first time proceeded to deny the claim of transfer related expenditure amounting to Rs.1,69,18,142/- on the premise that the assessee was unable to substantiate its claim without affording any opportunity to lead evidence in support thereof. He submitted that the CIT(A) has nowhere disputed the allowability of claim of deduction in terms of section 48(1) of the Act, but, denied the claim of the assessee merely on the ground that such claim remained unsubstantiated. He submitted that the CIT(A) during the course of appeal proceedings only directed the assessee to submit documentary evidences in support of transfer related expenses. The various documents furnished by the assessee were not at all considered or even acknowledged by the CIT(A). The ld. Counsel for the assessee filed certain evidences in shape of additional evidence and submitted that these evidences go to the root of the matter and should be admitted for adjudicating the issue. He submitted that he has no objection if the same is restored to the file of the AO with the direction to examine the various evidences subsequently filed in support of expenses incurred on sale of the shares and

claimed as expenses under section 48(1) from such long term capital gain. The ld. counsel has also relied on various decisions placed in the compilation of paper book.

7. The Ld. DR, on the other hand, heavily relied on the order of the AO and the CIT(A). He submitted that the assessee has not substantiated incurring of expenditure for earning such long term capital gain shown as deduction under section 48(1) of the Act. He, accordingly, submitted that the order of the CIT(A) should be upheld and the ground raised by the assessee should be dismissed.

8. We have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the AO in the instant case treated the long-term capital gain claimed by the assessee on account of sale of shares as short-term capital gain on the ground that the duration of the holding of such shares was less than 12 months and, therefore, it was short-term capital gain. Subsequently the AO did not allow the benefit of deduction under section 54EC of the Act amounting to Rs.50 lacs. The ld.CIT(A) held that the profit on sale of shares is long-term capital gain and allowed deduction claimed under section 54EC amounting to Rs.50 lakhs. The Revenue is not in appeal against the order of the CIT(A) holding such profit on sale of shares as long term capital gain. Therefore, now the only question that remains to be adjudicated is as to whether the various expenses claimed by the assessee on

account of travel and litigation expenses to the tune of Rs.1,69,18,142/- incurred during the financial year 2009-10 is an allowable expenses under section 48(1) to be claimed as deduction from such long term capital gain. As stated earlier, the AO had not adjudicated this issue since he treated the capital gain as short term capital gain. We find the CIT(A) rejected the claim of the assessee on the ground that the assessee could not substantiate its claim that the travel and litigation expenses should be deducted for computing long term capital gain. It is the submission of the Id. counsel that various details furnished before the CIT(A) were not properly gone through by him and he has not passed any comments on that. The Id. counsel for the assessee also filed certain additional evidences and submitted that these evidences go to the root of the matter of the issue in hand. Considering the totality of the facts and circumstances of the case and in the interest of justice we admit the additional evidences and restore the issue to the file of the AO with a direction to adjudicate the issue relating to allowability of deduction of such traveling and litigation expenses from the long term capital gain earned by the assessee. Needless to say, the AO shall decide the issue afresh in accordance with the law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. The ground raised by the assessee is accordingly allowed for statistical purposes.

9. Ground No.2 raised by the assessee reads as under:-

ö2. That the Commissioner of Income Tax (Appeals) erred on facts and in law in upholding the order of the Assistant Commissioner of Income Tax disallowing the Long Term Capital Loss incurred by the appellant on sale of Preference Shares held by it for more than 12 months.ö

10. The facts of the case, in brief, are that the AO during the course of assessment proceedings noted that the assessee company has claimed long-term capital loss of Rs.4,12,59,906/- on account of sale of preference shares of Fiza Rozil Exports Private Limited at the price of Rs.10/- per share which are purchased by the company @ Rs.100/- per share in the financial year 2001-02. According to AO, the assessee company was conscious of the capital gain being earned on sale of shares, therefore, the preference shares of Fiza Rozil Exports Private Limited were sold at a nominal price of Rs.10/- each. He, therefore, held that sale of shares was a sham transaction and there was no real transaction. According to the AO, the investment in shares of Fiza Rozil Exports Private Limited and its subsequent sale were only seen as a vehicle for booking losses adopted by the assessee. Relying on the decision of Honöble Bombay High Court in the case of Killick Nixon Limited vs. DCIT, ITA 5518/2010, wherein it was held that as the transaction undertaken by the assessee was not genuine, but, a colourable device and there could be no question of tax planning or legitimate avoidance of tax liability, the AO held that the long-term capital loss claimed in the tax return by the assessee is not allowable.

10.1 In appeal, the ld. CIT(A) upheld the action of the AO. While doing so, he observed that the assessee was not able to controvert the findings of the AO and establish the genuineness of the loss claimed. He also relied on the decision of the Honble Supreme Court in the case of Sumati Dayal vs. CIT, 214 ITR 801, wherein it was held that taxing authorities are entitled to look into the surrounding circumstances to find out the reality and the matter has to be considered by applying the test of human probabilities. Accordingly, he upheld the action of the AO.

11. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal.

12. The ld. counsel for the assessee filed certain additional evidences in the shape of audited financial statements of M/s Fiza Rozil Exports Private Limited for the financial year ending 31.03.2007 and 31.03.2008, copy of letter dated 8th May, 2008 addressed to the shareholders of Fiza Rozil Exports Private Limited and also copy of financial documents of the company and submitted that a perusal of the above along with the financials of the company for 2001-02 would show that there is no sham transaction at all. He submitted that the assessee company was expecting relief from the RBI. Further, the various evidences were not at all considered by the lower authorities. He accordingly submitted that the matter may be restored to the file of the AO with the direction to adjudicate the issue afresh in the light of the additional evidences furnished by the assessee.

13. The ld. DR, on the other hand, heavily relied on the order of the CIT(A). He submitted that the assessee was fully aware of the long-term capital gain and to set off the same, he entered into a sham transaction by selling the shares at very low price and claimed huge loss. He submitted that the order of the CIT(A) under the facts and circumstances is fully justified and the same should be upheld.

14. We have considered the rival arguments made by both the sides, perused the order orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions placed in the paper book. We find, the AO, in the instant case, rejected the claim of long-term capital loss of Rs.4,12,59,906/- on account of sale of 280000 preference shares of M/s Fiza Rozil Exports Private Limited which were purchased at a price of Rs.100/- in the financial year 2001-02 and sold at a price of Rs.10/- during the impugned financial year holding the same to be a sham transaction. We find, the ld. CIT(A), relying on the decision of the Honøble Supreme Court in the case of Sumati Dayal (supra), upheld the action of the AO. It is the submission of the ld. counsel that if the financials of the said company is gone through from financial year 2001-02, till the date of sale, it will be seen as to why the shares were sold at a lower price. It is also his submission that the AO, without affording any opportunity whatsoever came to the conclusion that the transaction is a sham transaction which has been upheld by the CIT(A). We find some force in the argument of the ld. counsel that a perusal of the assessment order shows that the AO nowhere has confronted the

assessee regarding the sale of such shares at Rs.10/- per share which were purchased at a price of Rs.100/-. The order of the CIT(A) is also silent on this issue. Considering the totality of the facts of the case and in the interest of justice, we deem it proper to restore the issue to the file of the AO with the direction to go through the various evidences including the additional evidence filed before the Tribunal which are admitted by us and decide the issue afresh and in accordance with the law. Needless to say, the AO shall give due opportunity of being heard to the assessee. We hold and direct accordingly. Ground No.2 by the assessee is accordingly allowed for statistical purposes.

15. In the result the appeal filed by the assessee is allowed for statistical purposes

The decision was pronounced in the open court on 30.09.2020.

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 30th September, 2020.

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Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi