

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI S. RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No.5507/Mum/2018

(निर्धारण वर्ष / Assessment Years: 2013-14)

ITO-25(3)(4) Room No. 603, C-10, 6 th Floor, Pratyakshkar Bhavan, Bandra Kurla Complex, Bandra (E), Mumbai- 400093.	बनाम/ Vs.	Minal Bharat Patel 602, Boston House, Suren Road, Andheri (E), Mumbai-400093.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACPP5126G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Vasudev Ginde & Kumar Kale
Revenue by:	Shri Ram Krishn Kedia

सुनवाई की तारीख / Date of Hearing: 30/05/2022

घोषणा की तारीख /Date of Pronouncement: 14/06/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the revenue against the order of the Ld. Commissioner of Income Tax (Appeals)-37, Mumbai dated 16.07.2018 for the assessment year 2013-14.

2. Brief facts of the case are that the assessee is an individual. The return of income was filed on 31.07.2013 declaring total income of Rs.16,36,740/-. The return was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter "the Act"). Subsequently, the case was selected for scrutiny by issue of notice u/s 143(2) of the Act. The authorized representative appeared before the AO and filed details during the assessment proceedings. The assessee has shown Short Term Capital Gain [STCG] of Rs.12,18,961/- and Long Term Capital Gain [LTCG] of Rs.17,01,85,391/- on sale of shares. The assessee claimed exemption u/s 10(38) of the Act for the entire LTCG. Further, the assessee had also shown LTCG of Rs.1,00,31,538/- on redemption



*ITA No.5507/Mum/2018
A.Y. 2013-14
Minal Bharat Patel*

of fifty (50) Non-Convertible Debentures (NCDs) of M/s. Skydeck Properties Pvt. Ltd. However, the AO has treated the amount received by the assessee on sale of shares as business income but allowed the LTCG claim of Rs.17,01,85,391/- on sale of shares by treating the assessee as an investor. Whereas the AO did not accept the assessee's claim in respect of the claim of STCG and he treated sale of shares in this regard as business income. Aggrieved by the action of the AO, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to accept the stand of the assessee that the assessee was an investor and the claim of STCG on sale of shares was accepted and the AO's action of treating the same as business income was reversed. Aggrieved by the aforesaid action of the Ld. CIT(A), the revenue is in appeal before us by preferring the aforesaid ground of appeal.

3. We have heard both the parties and perused the records. We note that the assessee is an individual who has earned substantial LTCG of Rs.17.02 crores which included capital gain on some shares held for as long as two to three years. Even though, the AO accepted the claim of LTCG from sale of shares, he didn't accept the claim of assessee about the STCG from sale of shares and treated it as business income. It was brought to our notice that the assessee is a high net worth individual having net worth of Rs.135.20 crores and invest in shares to the tune of Rs.107.78 crores as on 31.03.2013 (A.Y.2013-14). Even though, the AO accepted the LTCG claim of Rs.17.02 crores from sale of shares which means AO accepted the AO as an investor on this capital gain but he did not accept the STCG claim of the



ITA No.5507/Mum/2018

A.Y. 2013-14

Minal Bharat Patel

assessee of Rs.12,18,961/- on the ground that there is high volume, frequency and continuity of transactions. However, the AO has not taken into consideration, the high value of investment made by assessee i.e. over Rs.107.78 crores which the assessee had invested in shares as an investor. We note from the details of investment made by the assessee in shares that the assessee was investing in only few selected companies which were mainly small cap and mid cap segments of the market. Since the number of investee companies being less, the investment the assessee made in those shares would be of higher quantity. The Ld. AR took pains to show us that the yardstick the AO adopted to hold assessee's claim of STCG as business income was erroneous. In respect of frequency of transaction also one needs to appreciate the assessee's investment in shares to the tune of Rs.107.78 crores, which is also a factor. The Ld. AR brought to our notice that the assessee purchased shares of small/mid cap companies mainly as an investment. However, when she sees the price of certain scrips purchased by her going up, she would sell it as a prudent person because she has to recover/protect the investment she made also looking at the emerging market scenario. So at times, she earns STCG from such transactions from sale of certain scrips originally meant/purchased for investment purpose only. So according to assessee, holistic approach is necessary to appreciate the claim of assessee regarding the STCG claim. We note that the assessee has always been considered as an investor by the department. We note that from the chart furnished by the Ld AR of the assessee that for A.Ys.



ITA No.5507/Mum/2018
A.Y. 2013-14
Minal Bharat Patel

2001-02 to 2015-16, except for the year under consideration, the status of the assessee has been accepted as investor in A.Ys.2001-02, 2002-03, 2005-06, 2006-7, 2007-08, 2008-09, 2012-13 at the assessment stage only. For A.Ys.2003-04, 2004-05, 2009-10 & 2010-11, the status of the assessee as an investor was accepted by the Ld. CIT(A) which action was confirmed by the Tribunal. Further, it was brought to our notice that the appeal of the revenue for A.Y.2003-04 and 2004-05 has been dismissed by the Hon'ble Bombay High Court. It was brought to our notice that for AY.2010-11 the assessee's stand that she was an investor in shares has been accepted by this Tribunal in ITA. No.4093/Mum/2016 vide order dated 28.12.2018. Therefore, on the principle of consistency also the assessee's role as an investor should not have been disturbed. It was brought to our notice that for A.Y.2014-15, the AO had accepted the assessee's status as an investor and hence he did not treat the claim of STCG on sale of shares as business income. We also note that the assessee had been maintaining her books of accounts by showing the shares as investment which are reflected in the balance-sheet accordingly. We also note that the shares are always valued at cost and assessee never took any benefit of valuation loss for invested shares, even if the market value had fallen below the cost. We note that this accounting practice has been consistently followed by the assessee for several years and is a deciding factor in such matters as held by the Hon'ble Jurisdiction High Court in the case of CIT VS. Gopal Purohit (2011) 336 ITR 287 Mumbai. Considering the aforesaid facts as well as taking into



ITA No.5507/Mum/2018
A.Y. 2013-14
Minal Bharat Patel

consideration the CBDT Circular No.04/2007 dated 15.06.2007, we find that the assessee's intention of buying and selling of shares was that of an investor and therefore, the action of the AO to treat the consideration from sale of shares to the tune of Rs.12,18,961/- as business income has been rightly not agreed upon by the Ld. CIT(A). Taking into consideration the aforesaid facts, we find that there was no new facts before the AO to upset the earlier actions taken by the department to treat the assessee as an investor. So on the principle of consistency also the assessee has made out a case in her favour. Therefore, we are inclined to uphold the order of the Ld. CIT(A) and dismiss the ground of appeal raised by the revenue.

4. Coming to the next issue raised by the revenue which is against the action of the Ld. CIT(A) deleting the Long Term Capital Loss (LTCL) of Rs.4.12 crores claimed by the assessee from the off-market share transactions. Brief facts of the case is that the assessee had incurred LTCL of Rs.4,42,13,621/- on sale of seven (7) listed shares in off-market transactions which were not subjected to STT. The list of of the seven scrips are given by the AO which is reproduced as under: -

“5.2 The assessee purchased the following shares on which STT is paid and all these shares were held by the assessee for more than 12 months which were sold off-market: -

Mafatal ind	Qty	Rate	Value	Qty	Rate	Value	
BL Kashyap	183.000	165.05	30203880.00	183.000	127.00	23241.000.000	-6962880.00
Baroda Rayon	526.978	15.45	8.142995.94	1550.000	8.60	4532010.80	3610.985.14
Centum Electronics	1,350.00	5.81	23.253527.19	193.646	4.05	6277500.00	2734186.38
Hinduja Foundries	193.646	120.08	7.818961.53	86.186	51.65	40001815.90	13.251711.29
Kesoram Ind	86.186	90.72	25719711.76	139.879	49.60	4274825.60	3544135.93
Southern Spetrochemical	139.879	183.87	23.059232.85	914.575	132.45	16142248.75	9916984.10
Total	914.575	23.31	127,209,995.66		17.65	92,996,374.60	



ITA No.5507/Mum/2018

A.Y. 2013-14

Minal Bharat Patel

5. Even though, it is undisputed that the seven scrips were sold in the off-market transactions at the prevailing market price as on date of sale without suffering STT, the AO has disallowed the loss claimed by the LTCL claimed by the assessee. According to the AO, the assessee had sold these shares to some of the parties whose demat statements were managed by the share-broking company in which the assessee is one of the director; and moreover, the AO noted that even though these seven scrips were purchased by the assessee & held for more than 12 months after purchasing it on which STT were paid, she had claimed loss, by selling the same off-market without STT, which action of assessee the he/AO refused to accept. According to AO since assessee had purchased these shares by remitting STT & held them for more than 12 months therefore the assessee's was entitled to exemption u/s 10(38) of the Act for any LTCL provided the shares were sold on stock exchange. According to the AO if the assessee had incurred loss (LTCL) on sales of shares through the transaction through stock exchange, then it would have been adjusted against any such income and it could not have been carried forward. Therefore, the AO disallowed the claim of the assessee holding it as bogus. Aggrieved by the action of AO, the assessee preferred an appeal before the CIT(A) who was pleased to allow the claim of the assessee. Aggrieved by the aforesaid action of the Ld. CIT(A), the revenue is before us.

6. We have heard both the parties and perused the record. The issue for our consideration is whether the LTCL claim of the assessee on sale of seven scrips in the off-market transactions can be allowed to



ITA No.5507/Mum/2018

A.Y. 2013-14

Minal Bharat Patel

be set off and carried forwarded as per the provisions of the Act. We note that there is no prohibition of the assessee in sale of the shares in off-market. It was pointed out to us from the information downloaded from the website of NSDL that off-market transactions are recognized and permitted. In this regard, the Ld. AR drew our attention to the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Smt. Jamnadevi Agarwal (2010) 328 ITR 656 (Bom) wherein it was observed "*.....it is true that some of the transactions were off-market transactions. However, the purchase and sale price of the purchase shares declared by the assessee were in conformity with the market price prevailing on the respective dates as is seen from the documents furnished by the assessee. Therefore, the fact that some of the transactions were off-market transactions cannot be a ground to treat the transactions as sham transactions.....*".

7. It was brought to our notice that the main allegation of the AO was that the De-mat accounts of certain buyers of these seven scrips were handled by the share broking company of which the assessee was one of the Director. We note that this particular contention of the AO has no relevance. We note that the assessee was one of the Director of M/s. Finquert Securities Pvt. Ltd. a company engaged in the business of share broking as a registered member of both BSE as well as NSE. Buyers of the scrips in question happened to be clients of this broking company and therefore, they also maintained their respective De-mat account with M/s. Finquert Securities Pvt. Ltd. The said broking



ITA No.5507/Mum/2018

A.Y. 2013-14

Minal Bharat Patel

company acted as a Depository Participant (DP) and as such it maintained their De-mat account. It has to be borne in mind that the transfer in and out of these De-mat account are permitted only when the client signs the instruction slip and not otherwise. It is like a bank maintaining a saving /current account of a client. In this context, the Ld. DR could not point out how this allegation of AO has any material bearing in this case. Moreover, it was brought to our notice that the AO in the assessment year for A.Y.2014-15 has accepted the same transaction in the scrutiny assessment u/s 143(2) of the Act (*except in-respect of three scrips, where the reasons given by AO was that same were executed at a price more than the prevailing market price on the relevant date*). We note that the AO has accepted the other transaction carried out by the assessee in the off-market transaction where the price was as per the prevalent market prices. Thus we note that the AO had no objection to off-market transactions per-se for A.Y.2014-15, when the same was transacted off-market. Coming back to the relevant AY 2013-14, it was brought to our notice that all the transactions (except) the scrip of Baroda Rayon where shares were not traded for long and hence market price was not available. Considering the aforesaid facts as well as the case laws in similar case wherein the Tribunal has accepted the off-market transaction of an assessee who had also made the claim of set off of or carried forward, as the case may be was allowed by the Tribunal. We note that the Delhi Tribunal in the case of Mridu Hari Dalmia Parivar Trust Vs. Assessing Officer (2016) 68 taxmann.com 376 (Delhi- Trib) wherein the fact of the case



*ITA No.5507/Mum/2018
A.Y. 2013-14
Minal Bharat Patel*

has been briefly stated as head notes as under page no. 59 of the P.B. and the Tribunal on the aforesaid facts has held as under: -

“The assessee suffered a long-term capital loss on share transactions, which amount was carried forward for future set off.

The assessing officer observed that the assessee transferred those shares through off-market sale on loss without payment of Securities Transaction Tax (STT), and that if these transactions had been made through recognized Stock Exchange with STT payment then the loss would not have been carried forward within the meaning of section 10(38). He held that the assessee used a colorable device to avoid tax in connivance with the trustees/beneficiaries by simply placing the shares in the hands of the trustees and showing such placement as off-market sale. He, therefore, disallowed such loss by holding it as bogus.

On appeal, the Commissioner (Appeals) approved the view taken by the Assessing Officer.

On second appeal, the Tribunal held as under;-.

12. Coming back to our context, we find that [section 10\(38\)](#) is an exemption provision. This exemption provision states that any income arising from transfer of equity shares etc., held as long-term capital asset on which STT is paid, will be exempt from taxation. As income includes losses also, this provision applies to both positive and negative income. In other words, if the conditions stipulated under this provision are fulfilled, namely, there is a transfer equity shares etc., held as long term capital asset on which STT is paid, then the resultant gain will not be chargeable to tax and the resultant loss, if any, will equally not qualify for set off and carry forward. In order to fall within the purview of [section 10\(38\)](#), it is sine qua non that STT must have been paid on the transaction of sale of such equity share held as long-term capital asset. It is undisputed that STT is payable in respect of transactions carried through a Stock Exchange, which are called on-market transactions. If there is some off-market transaction, namely, which is undertaken without involvement of a Stock Exchange and is



ITA No.5507/Mum/2018

A.Y. 2013-14

Minal Bharat Patel

directly between the buyer and seller, then no STT is payable thereon. This implies that if the transaction is off-market, then, no STT would be payable and, ex ITA No.1880/Del/2014 consequenti, the provisions of [section 10\(38\)](#) would not be magnetized. Once this section is not applicable, there can neither be any exemption of income nor there can be any question of denial of benefit of set off and carry forward of loss. In other words, loss arising from transfer of shares etc., held as long term capital assets, on which no STT is paid because of off-market sale transaction, does not fall within purview of [section 10\(38\)](#) and consequently becomes eligible for set off and carry forward as per the other relevant provisions. This is a lacuna in the provision which has been lawfully exploited by the assessee by transferring shares held as long-term capital assets through off market transactions resulting into genuine loss and thus escaping the rigor of the exemption provision contained in [section 10\(38\)](#), which would have otherwise disentitled it to claim set off and carry forward of such a loss. The AO has held these off-market sale transactions as a colorable device and tax avoidance scheme adopted by the assessee to evade payment of legitimate tax due to the exchequer. In our considered opinion, this is a glaring example of tax planning rather than the tax avoidance as has been held by the AO. In view of the fact that the assessee entered into ITA No.1880/Del/2014 valid transactions of transfer of shares of Bajaj Hindustan Ltd., Tata Consultancy Ltd. and Reliance Communications Ltd. to Shri M.H. Dalmia and Smt. Abha Dalmia, we hold that the loss suffered on such transactions is a genuine loss which cannot be disallowed as it does not fall within the ambit of [section 10\(38\)](#) because of non-payment of STT. Overturning the impugned order on this issue, we direct the allowing of carry forward of loss amounting to Rs.1.86 crore.



ITA No.5507/Mum/2018

A.Y. 2013-14

Minal Bharat Patel

8. Respectively following the ratio of the co-ordinate bench of this Tribunal in the aforesaid case Mridu Hari Dalmia Parivar Trust (supra) and considering the facts and circumstances discussed (supra) we are inclined to uphold the action of the Ld. CIT(A) and dismiss this ground of appeal accordingly.

9. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on this 14/06/2022.

Sd/-

(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 14/06/2022.
Vijay Pal Singh, (Sr. PS)

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai