

आयकर अपीलिय अधिकरण, 'ए' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: CHENNAI

श्री महावीर सिंह, माननीय उपाध्यक्ष, एवं
श्री जी. मंजूनाथा, माननीय लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, HON'BLE VICE PRESIDENT AND
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.2882/Chny/2018 &
ITA No.2744/Chny/2019
निर्धारण वर्ष /Assessment Year: 2015-16

Mr.Lakshmanan,
No.7/2, 1st Floor, AKM Nest,
Jawaharlal Nehru Street, T.Nagar,
Chennai-600 017.
[PAN: AABPL 4326 R]
(अपीलार्थी/Appellant)

v. The Income Tax Officer,
Non-Corporate Ward-1(3),
Chennai.
(प्रत्यर्थी/Respondent)

आयकर अपील सं./ITA No.2883/Chny/2018
निर्धारण वर्ष /Assessment Year: 2015-16

Mrs.Lakshmanan Revathi,
No.7/2, 1st Floor, AKM Nest,
Jawaharlal Nehru Street, T.Nagar,
Chennai-600 017.
[PAN: AFGPR 2974 H]
(अपीलार्थी/Appellant)

v. The Income Tax Officer,
Non-Corporate Ward-1(3),
Chennai.
(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Mr.T. Vasudevan, Adv.
प्रत्यर्थी की ओर से /Respondent by : Mr.AR.V.Sreenivasan,
Addl.CIT
सुनवाई की तारीख/Date of Hearing : 15.11.2022
घोषणा की तारीख /Date of Pronouncement : 18.11.2022

आदेश / ORDER

PER G. MANJUNATHA, ACCOUNTANT MEMBER:

These three appeals filed by two different assesseees are directed against separate but identical orders of the Commissioner of Income Tax (Appeals)-2, Chennai, dated 20.08.2018 & 22.07.2019 and pertains to

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assessment year 2015-16. Since, the facts are identical and issues are common, for the sake of convenience, these appeals are being heard together and disposed off, by this consolidated order.

ITA Nos.2882 & 2883/Chny/2018

2. Both the assesseees have risen common grounds of appeal in their respective memorandum of appeal and therefore, for the sake of brevity, grounds of appeal filed in ITA No.2882/Chny/2018, are re-produced as under:

1. *The order of the Commissioner of Income-tax(Appeals) in dismissing the appeal is contrary to law, erroneous and unsustainable on the facts of the case.*
2. *The CIT(A) erred in confirming the order of the officer treating the purchase and sale of shares as speculative transaction under sec.43(5) as against the assessee returning short term capital gains.*
3. *The CIT(A) further erred in denying the adjustment of the carried forward business loss against the STCG computed by the assessee.*
4. *The CIT(A) failed to appreciate that the assessee had invested in shares out of own sources and all along treated the holding as investments and not as stock-in-trade. and hence the gains arising therefrom is subject to capital gains in assessee's hands.*
5. *The CIT(A) failed to appreciate that the shares transacted by the assessee enter the demat account at the end of each day and was not correct in holding that delivery is not taken and so constitutes speculative business of assessee.*
6. *The CIT(A) further failed to appreciate that the sale of shares is effected only after delivery is taken and it enters the demat account and hence the assessee has rightly considered it as short term capital gains.*
7. *The CIT(A) further failed to appreciate that the assessee has never indulged in intraday trade in shares and the shares transacted by assessee are only in the nature of investments so in the light of CBDT Circular No.6 of 2016, the profit on sale of shares ore to be assessed under the head capital gains and hence the conclusion of lower authorities is not in accordance with law and facts of the case.*
8. *The CIT(A) further failed to appreciate that the assessee is statutorily entitled to the benefit of adjusting the short term capital gains against brought forward business loss and denial of the same wholly unjustified and untenable in law.*

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9. *The CIT(A), in any event, ought to have seen that the assessee has rightly applied the provisions of sec.45 and returned STCG and adjusted it against the brought forward loss and does not warrant the rejection of the same.*

10. *The CIT(A), in any view of the matter, ought to have considered the contentions in the proper perspective and allowed the appeal.*

3. The brief facts extracted from ITA No.2882/Chny/2018 are that the assessee is an individual derives income from certain capital gains and income from other sources filed his return of income for the AY 2015-16 on 30.07.2015 admitting total income of Rs.1,10,240/-. During the course of assessment proceedings, the AO noticed that the assessee has derived short term capital gains of Rs.21,08,433/- from purchase & sale of equity shares and set off said capital gains against brought forward short term capital loss. The AO called upon the assessee to produce necessary evidences, including relevant contract notes, DMAT A/c and bank statement to verify the claim of the assessee. In response, the assessee has produced all records on 10.01.2017. The AO on the basis of information furnished by the assessee observed that assessee has traded in various scrips on intra-day without taking delivery and volume of such trade is approximately Rs.45 Crs. Therefore, the AO opined that purchase and sale of shares is covered under provisions of Sec.45(3) of the Act, and same is in the nature of speculative transactions and thus, profit derived from purchase and sale of shares has been assessed as speculative business income. The AO had also denied set off brought forward capital loss against speculative business profits. The relevant findings of the AO are as under:

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3. During the year, the assessee has derived a STCG of Rs.21,08,433/- and had adjusted the same to the entire extent against brought forward capital losses. The assessee along with the records produced on 10.01.2017 had provided the complete list of transactions in schedule 7 of the memo of computation of total income. This tabulation consisting of 24 sheets result in a profit of Rs.21,08,433/- . On verification of the particulars of date of purchase and date of sale, it is seen that both the events occur on the same day in respect of each and every transaction reported in it. Intriguingly, the demat account of the assessee does not exhibit the transactions involving a magnitude of 45 crores approximately.

4. it is clear from the details available in the form of sale date and of purchase date and also that the securities have not been taken delivery. Therefore, it attains a character of intra-day trading in securities within the same day. Since, the actual delivery has not been taken which is affirmed by the lack of corresponding entries.

5. The magnitude of transactions which is in phenomenal proportions as compared to the profits (Rs.45.42 crores vs Rs.21 lakhs) categorizes the transaction to be an adventure in the nature of trade and not for the sake of investment. Therefore, the profits derived from such voluminous transaction is to be treated as business income and falls under the purview of taxation under sec 28. Since, the transactions carried on by the assessee is covered under the provisions of sec 45(3), it is classified as a speculative business income and thus brought to tax under normal rates of taxation.

6. Since, brought forward capital loss cannot be adjusted against speculative business profits, this sum of Rs.21,08,433/- is taxed as such.

4. Being aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee reiterated his arguments made before the AO and contended that purchase and sale of shares are through demat account and the assessee has taken delivery of scrips. Therefore, same cannot be considered as speculative transactions. The Ld.CIT(A) after considering relevant submissions of the assessee and also taken note of various facts observed that the assessee has carried out purchase and sale of shares and stock on intra-day without taking any delivery and thus, the observations of the AO that transactions are in the nature of speculative transactions as defined u/s.45(3) of the Act is correct. Therefore, rejected the arguments of the assessee and sustained the additions made towards speculative business profits and rejection of

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set off of brought forward capital loss. The relevant findings of the Ld.CIT(A) are as under:

6. *In addition to the grounds of appeal, the Ld.AR of the assessee has also furnished written submission in the course of the appellate proceeding. I have gone through the facts of the case and have also considered the rival submissions. In view of that the case is discussed as under:*

7. *The first contention of the Ld.AR is that there was no intention to make trading in securities as far as the appellant assessee is concerned. Hence, it is submitted that the action of the AO was not called for in treating such transactions as adventure in the nature of trade. This contention of the appellant assessee is not found tenable. Whether a particular transaction is in the nature of business or investment, it has to be ascertained from the facts of the case and the surrounding circumstances. In the present case of the appellant assessee, it is an admitted fact that he was involved in intraday transactions in securities. Secondly, the demat account did not exhibit this transaction. Thirdly, there was no delivery of securities. Hence, in view of the above facts, the AO had rightly held the impugned transactions as adventure in the nature of trade. The appellant assessee has also relied on the decision of the Hon'ble jurisdictional High Court in 305 ITR 434 wherein it was held that whether there was intention to make trading or hold the shares as investment, no single factor conclusive or decisive should be considered but the host of other factors should also be taken into account.*

8. *In the present case of the appellant assessee also, the AO has taken into account all the relevant factors and the surrounding circumstantial evidences to consider the impugned transaction as adventure in the nature of trade. Therefore, the ratio of the above discussed decision of the Hon'ble High Court rather fortifies the finding of the A.O. Hence, in view of the above discussions, I do not find any infirmity in the finding of the AO that the impugned transaction carried out by the appellant assessee was adventure in the nature of trade and not for the sake of investment. Accordingly, this contention of the assessee is rejected.*

9. *The other issue raised by the appellant assessee is that there has to be consistency in the action of the assessing' officers. To substantiate his arguments, the assessee has also relied upon the decisions of High Court of Delhi in the case of Gulmohar Finance 170 Taxman 483; Mum ITAT in Janak S. Rangwalla 11 SOT 627, P & H HC in 260 ITR 417.*

10. *In order to verify the above contention of the appellant assessee, I have perused the earlier assessment order of the assessee the AY 2007-08 which the Id. A.R. has also referred to. On examination of the same, it is noticed that nowhere in the assessment order, the issue of taxability of profits from the sale of securities have been discussed. Therefore, the question of rule of consistency does not arise. It is also pertinent to mention here that the rule of consistency or res judicata is not applicable as far as the proceedings under the Income Tax Act are concerned. Therefore, the contention of the appellant assessee is not found tenable, hence, is rejected.*

11. *Now coming to the merits of the case; whether the impugned transactions could be considered as adventure in the nature of trade, as held by the AO, or just an investment as contended by the appellant assessee. There is a clear difference*

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between intraday Trading and Delivery Trading. The intraday trades involve buying and selling stock within a trading session, i.e. on the same day. If you do not square your position by the end of the day; your stock can be sold automatically at the day's closing price under certain brokerage plans.

12. On the other hand in delivery trade, the stocks purchased are added to your demat account. They remain in your possession until you decide to sell them, which can be in days, weeks, months or years. You enjoy complete ownership of your stocks.

13. How do intraday trades differ from delivery trades? It is important to take note of the tax treatment of the profits that you earn from day trading. If the securities transaction tax (STT) has been paid, the short term capital gains from stocks are taxed at 15%. However, STT is payable only if you have taken delivery of the stocks and then sold them. It is not payable on intra-day transactions. So, any profit from day trading is treated as speculative income and taxed as income from business. So, the tax can be as high as 30% in case of individual.

14. From the above analysis of intraday trade and delivery trade, it becomes evidently clear that in the present case of the appellant assessee, he was involved in intraday trade only. It is also clear that the appellant assessee had not paid STT since the delivery of securities was not taken by the assessee. Therefore, as rightly held by the AO, the impugned transaction was adventure in the nature of trade which had been rightly classified as speculative business income.

15. Accordingly, in view of the above facts and in the circumstance of the case. I confirm the finding of the AO and also sustain the action of the AO in disallowing the adjustment of brought forward capital loss against such speculative business profit.

5. The Ld.Counsel for the assessee submitted that the Ld.CIT(A) erred in upholding the findings of the AO in assessing profit derived from purchase and sale of shares as speculative business income without appreciating the fact that the assessee has carried out purchase and sale of shares through demat account and such shares have been taken delivery on settlement of contracts. The Ld.Counsel for the assessee further submitted that the assessee is into this business activity for many years and in earlier years, the Department has accepted the claim of the assessee that purchase and sale of shares is investment activity and profit or loss derived from such is activity either capital gain or capital loss. Therefore, unless there is a change in the facts for the impugned assessment year,

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different view cannot be taken. In this regard, he relied upon CBDT Circular No.6 of 2016 and also certain judicial precedents, including the decision of the Hon'ble Madras High Court in the case of CIT v. Trishul Investments Ltd., reported in [2008] 305 ITR 0434.

6. The Ld.DR, on the other hand, supporting the order of the Ld.CIT(A), submitted that the Ld.CIT(A) has recorded categorical findings that the assessee is engaged in intra-day purchase and sale of shares without taking delivery and thus, said transactions is coming under speculative transactions as per sec.45(3) of the Act. Therefore, there is no error in the reasons given by the AO as well as the Ld.CIT(A) to assess income under the head speculative business transactions and their orders should be upheld.

7. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The facts brought out by the AO clearly indicate that the assessee is engaged in the activity of repetitive purchase and sale of shares in stock and intra-day without taking any delivery. Further, the volume of transactions carried out by the assessee also indicate that the assessee is engaged in repetitive transactions of purchase and sale without any delivery. As per the provisions of Sec.43(5), "speculative transaction" means –

"as a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips".

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Therefore, on the basis of facts brought out by the AO in light of provisions of Sec.43(5) of the Act, there is no doubt that purchase and sale of shares is speculative in nature and income from said activity is assessable under the head 'speculative business income' and to this extent, we are in agreement with the AO as well as the Ld.CIT(A). But, in so far as set off of brought forward capital loss against short term capital gains, the AO has denied brought forward capital loss against short term capital gains on the ground that income of the assessee is assessable under the head 'speculative business income'. It was the arguments of the assessee that he is into purchase and sale of shares for many years and in earlier years, the Department has accepted short term capital gains declared by the assessee from purchase and sale of shares. The assessee has declared short term capital loss for immediately preceding assessment year and the Department has accepted the claim. However, for the impugned assessment year without there being any change in the facts, the AO changed the head of income. Therefore, the Ld.Counsel for the assessee argued that, if at all, transactions of purchase and sale of shares are treated as speculative business transactions, then income/loss declared by the assessee for the earlier year also needs to be considered as speculative income or speculative loss and same needs to be set off against current year income. We find that the assessee is into share transactions activity for many years and in earlier years, the assessee has declared income under the head 'capital gains'. The assessee claims that the Department

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has accepted the claim of the assessee. In fact, the assessee has claimed set off of brought forward capital loss against current year income. If at all, the nature of transactions of purchase and sale of shares for earlier financial year and current financial year are one and the same, then, if the AO considers the transactions of the assessee are speculative in nature for the impugned assessment year, then brought forward capital loss also needs to be considered as speculative loss and needs to be allowed against current year income. Therefore, we are of the considered view that this issue needs to go back to the file of the AO for verification of the facts with regard the nature of transactions of the assessee for earlier assessment years. In case, the AO finds that loss declared by the assessee for earlier assessment years is in the nature of speculative loss, then, the AO is directed to allow set off of brought forward capital loss against current year income.

8. In the result, appeal filed by the assessee in ITA No.2882/Chny/2018 is partly allowed for statistical purposes.

ITA No.2883/Chny/2018:

9. The facts and issues involved in this appeal are identical to the facts and issues which we had already been considered in ITA No.2882/Chny/2018 in the case of Mr.Lakshmanan for the AY 2015-16. The reasons given by us in the preceding paragraphs shall ***mutatis mutandis*** to this appeal, as well. Therefore, for similar reasons, we direct

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the AO to decide the issues in accordance with findings of the Tribunal in case of Mr.Lakshmanan.

10. In the result, appeal filed by the assessee in ITA No.2883/Chny/2018 is partly allowed for statistical purposes.

ITA No.2744/Chny/2019:

11. Grounds of appeal filed by the assessee in ITA No.2744/Chny/2019 are as under:

1. The order of the Commissioner of Income Tax(Appeals) confirming the levy of penalty under sec.271 B of the Act is contrary to law, erroneous and unsustainable on the facts of the case.

2. The CIT(A) was not justified in upholding the penalty for non-filing of the audit report by merely referring to the addition made in the assessment and instead ought to have seen that the sec.44AB is not attracted in the case of assessee.

3. The CIT(A) failed to appreciate that the assessee does not satisfy any of the conditions to warrant the preparation and filing of audit report as per sec.44AB and hence confirming the levy of penalty on the pretext that an addition is made in the assessment is wholly unjustified and untenable in law.

4. The CIT(A) further failed to appreciate that the income returned by assessee was considerably less and does not exceed the threshold limit for application of sec.44AB and hence confirming the penalty was improper.

5. The CIT(A), in any event, ought to have seen that the addition in assessment was a result of changing the head of income from Capital Gains to Business Income and so the non-filing of audit report is only a venial breach and does not call for imposition of penalty in the light of the decision of Supreme Court in 83 ITR 26 and thus deleted the penalty.

6. The CIT(A), in any view of the matter, ought to have considered the contentions of assessee in the proper perspective and cancelled the levy of penalty under sec.271 B of the Act and allowed the appeal.

12. The brief facts of the case are that in this case, the assessment has been completed u/s.143(3) of the Act, on 11.12.2017 and determined total income of Rs.22,18,680/-. In the assessment, the AO has assessed short

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term capital gains declared by the assessee from purchase and sale of shares as speculative business transactions assessable under the head 'income from business and profession'. The AO further noticed that turnover from the business is in excess of prescribed limit for compulsory audit of books of accounts u/s.44AB of the Act, and thus, for non-furnishing of audit report as required under law, levied penalty of Rs.1,50,000/- u/s.271B of the Act. The assessee carried the matter in appeal before the First Appellate Authority, but could not succeed. The Ld.CIT(A) for the reasons stated in their appellate order dated 22.07.2019 sustained penalty levied u/s.271B of the Act.

13. It is the arguments of the Ld.Counsel for the assessee that when the assessee has declared purchase and sale of shares under the head 'capital gains', the question of maintenance of books of accounts and getting audited such books of accounts as per provisions of Sec.44AB of the Act, does not arise and consequently, for non-furnishing of audit report, penalty u/s.271B of the Act, cannot be levied.

14. The Ld.DR, on the other hand, submitted that it is the nature of transactions which decides the head of income, but not the conduct of the assessee. In this case, purchase and sale of shares are in the nature of speculative business transactions and thus, assessee ought to have maintained books of accounts and got audited such books of accounts as required u/s.44AB of the Act.

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15. We have heard both the parties and perused the materials available on record. We find that the issue of assessment of income from purchase and sale of shares, whether it is under the head 'capital gains' or under the head 'income from business or profession' is highly debatable and it depends upon various factors. According to the assessee, purchase and sale of shares are in the nature of investment activity which is assessable under the head 'capital gains' and thus, question of maintenance of books of accounts and got audited such books of accounts does not arise. According to the AO, transactions are in the nature of speculative business transactions and thus, assessee needs to maintain books of accounts and get audited such books of accounts as per sec.44AB of the Act. In our considered view, the issue is debatable and further, whether it is assessable under the head 'capital gains' or under the head 'income from business or profession', it can be ascertained on the basis of various facts. Therefore, once, the assessee has considered said transaction under the head 'capital gains' as investment activity, the question of maintenance of books of accounts and audit such books of accounts as required u/s.44AB of the Act, does not arise. It is not the case of the AO that the assessee has declared income under the head 'business and profession' and has not furnished Tax Audit Report as required u/s.44AB of the Act. Since, the assessee has consistently treating purchase and sale of shares transactions as investment activity and further not maintaining books of accounts for earlier also, merely because, the AO has changed the head of income, to

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income from business and profession, it cannot be held that the assessee has not maintained books of accounts and not furnished Audit Report as required u/s.44AB of the Act. Therefore, we are of the considered view that the AO is completely erred in levying penalty u/s.271B of the Act, and thus, we direct the AO to delete penalty levied u/s.271B of the Act.

16. In the result, appeal filed by the assessee in ITA No.2744/Chny/2019 is allowed.

17. In the result, appeals filed by the assessee in ITA Nos.2882 & 2883/Chny/2018 are partly allowed for statistical purposes and appeal filed by the assessee in ITA No.2744/Chny/2019 is allowed.

Order pronounced on the 18th day of November, 2022, in Chennai.

Sd/-
(महावीर सिंह)
(MAHAVIR SINGH)
उपाध्यक्ष /VICE PRESIDENT

Sd/-
(जी. मंजूनाथा)
(G. MANJUNATHA)
लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai,
दिनांक/Dated: 18th November, 2022.
TLN

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF