IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA
आयकर अपीलीय अधीकरण, न्यायपीठ – "C" कोलकाता,

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.1420/Kol/2019
Assessment Year: 2015-16

Assistant Commissioner of Income-tax, Circle-32, Kolkata.	Vs	Shri Chandravadan Desai 37, Shakespeare Sarani, Kolkata-700017. (PAN: AFQPD8487F)
(Appellant)		**(Respondent)**

Present for:
Appellant by : Shri Amal Sudhir Kamat, CIT
Respondent by : Shri Akkal Dudhwewala, FCA

Date of Hearing : 12.09.2022
Date of Pronouncement : 22.11.2022

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the revenue is against the order of Ld. CIT(A)-09, Kolkata vide ITA No. 183/CIT(A)-9/Cir-32/2017-18/Kol dated 27.09.2018 passed against the assessment order by the ACIT, Circle-32, Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") dated 28.12.2017.

2. Ground raised by the department in the present appeal relates to treating the Long Term Capital Gains (LTCG) of Rs.18,36,88,168/- and Short Term Capital Gain (STCG) of Rs.22,898/- as profits and gains of business.

3. At the outset, we note that there is a delay of 171 days in filing the present appeal for which application for condonation of delay is placed on record. Limitation to file the present appeal expired on

21.12.2018 and the appeal has in fact been filed on 10.06.2019. From the perusal of the petition furnished by the Ld. AO, it is noted that the delay occurred due to the procedural compliances and occupancies in time barring assessment proceedings by the concerned AO, all of which have been explained chronologically in the petition. Considering the administrative procedural requirement and occupancy of the Ld. AO in time barring assessment orders, we find it appropriate to condone the delay by taking justice oriented approach and admit the appeal for its adjudication.

4. Brief facts of the case are that assessee is engaged in trading and investment of shares and securities. He filed the return of income on 19.09.2015 reporting total income of Rs.64,72,990/-. In the P&L Account for the year under consideration, assessee reported the following main incomes as under:

(i) Dividend Rs.2,76,18,020/-;
(ii) Long term capital gain on shares Rs.18,36,66,805/-;
(iii) Interest on fixed deposits Rs.1,38,21,024/-;
(iv) Loss from share trading Rs.62,61,189/-.

4.1. Assessee claimed dividend income and LTCG on shares as exempt in the return. The claim of exemption comprised of Rs.18,36,66,805/- towards LTCG on shares u/s. 10(38) of the Act from the sale of listed shares which were held for a period of more than 12 months. The moot question before the Ld. AO in the assessment proceeding was whether trading and investment in shares are distinguished into separate compartments so that undue advantage of exemption u/s. 10(38) of the Act is not taken by the assessee. This question arose mainly because assessee claimed to have involved in trading of shares as well as in investment of shares for which he maintained separate DP accounts. Ld. AO noted that assessee maintains different DMAT accounts with C D Equisearch

Pvt. Ltd. (CDEPL), a member of Stock Exchange in which the assessee himself is the Chairman. The three different DMAT accounts maintained by the assessee are to mark long term investment, short term investment and trading. Ld. AO called for the details in respect of claims of the assessee from which he noted that assessee has indulged into total number of settlement 171 times with NSE and 143 times with BSE. Further, settlement in derivative segment was for 234 times. Ld. AO noted that assessee has virtually made no difference between "investment" and "trading" in accordance with CBDT Circular No. 06/2016 since the transactions in shares and derivatives shown in different DMAT accounts were settled through single bill. He also noted that no separate bills for purchase and sale of listed shares and derivatives have been made out in so called investment as claimed through DMAT statement having client ID Nos. 021644 and 390929 which are actually merged with the trading items and bills raised as well as net payment made thereof are always in composite manner.

4.2. Ld. AO doubted on the intention of the assessee while acquiring the shares and considering the frequency of share dealings with quantum of shares, derivatives etc., number of transactions held and the volume of transactions thereof coupled with composite dealings of all shares, derivatives through single statement in one bill, concluded that the assessee had or has only trading in shares. The assessment was thus completed by withdrawing the exemption u/s. 10(38) of the Act by holding that activity undertaken by the assessee is trading in nature only. Short term capital gain of Rs.22,898/- shown by the assessee was also treated as business income. Aggrieved, assessee went in appeal before the Ld. CIT(A).

4.3. Before the Ld. CIT(A) assessee made a detailed and elaborated submission on various aspects of the case to justify its claim. The detailed written submission furnished by the assessee is reproduced in the order of Ld. CIT(A) in para 3. It was submitted by the assessee that Ld. AO was not able to bring on record any material in support of his allegation that the distinction maintained by the assessee between the three DMAT accounts was artificial or a make belief arrangement.

4.4. On the aspect of intention of the assessee it was submitted that since 2001-02 when system of maintaining share portfolio in dematerialised (DMAT) format was introduced in India, assessee maintained DMAT account numbers being DP Client ID 00021631 with CDSL through its depository participant CDEPL in respect of his 'trading transactions' in shares. Assessee also maintained another DMAT account bearing client ID No. 00021644 with CDSL with its depository participant CDEPL in respect of "investment in shares'. It was submitted that whenever assessee purchased the shares for trading purpose, delivery of the shares was taken in trading DMAT account bearing No. 00021631. On the other hand, whenever the shares were acquired with an intention to hold it for investment purpose, the delivery was taken into DMAT account bearing No. 00021644. Thus, assessee made his intention of holding particular shares either as investment or for trading purchases manifestly cleared by taking the delivery either in investment DMAT account or in trading DMAT account. It was further submitted that there had been never any inter se transaction of shares from investment account to trading account or vice versa. It was also pointed out that Ld. AO could not show a single instance where the delivery of shares taken in the trading DMAT account at

the time of purchase were given delivery from investment DMAT account at the time of its sale and the income was declared under the head "capital gains" instead of "business" or vice versa.

4.5. Further, it was submitted that shares held on investment account were always valued in the books of the assessee "at cost" and in respect of said shares, deduction for STT paid was never claimed. However, shares acquired for trading purposes were valued by following the principle of "lower of cost or market value". Thus, valuation loss, if any, in respect of such shares was claimed and was allowed in the regular assessment. Also, STT paid in respect of trading shares was claimed as a deduction in computing the business profit which was also allowed. Assessee thus submitted that bifurcation between shares held as investment and trading was therefore not artificial but was always real and manifestly clear.

4.6. Assessee also submitted that he had transferred shares of only thirteen companies during the year under consideration in respect of which income by way of LTCG of Rs.18,36,65,270/- was realized. The sale consideration in respect of shares sold on investment account was Rs.32,07,35,301/- and in percentage terms, there was a capital appreciation in excess of 57% on his investments. It was also submitted that additionally, the assessee had earned dividend income of Rs.2,76,18,020/- giving a total return in excess of 45% on the opening cost of the investments.

4.7. On the allegation of the Ld. AO that segregation of DMAT account was nothing but eye-wash, it was submitted that distinction between trading stock and investment is within the knowledge of assessee only. The broker through whom transactions are

conducted is not at all concerned about the nature of assessee's holding of shares. Broker is obliged to conduct the transactions and prepare the relevant documentation strictly in conformity with stock exchange regulations. Broker is required to issue contract notes in conformity with the regulations of the relevant stock exchange as approved by SEBI. It was thus submitted that prior to 2014, brokers were permitted to issue multiple contract notes everyday which were issued in respect of transactions conducted by the broker on clients' account in different segments such as capital market or F&O. An option was available to either issue consolidated contract note or separate contract note. Reference was made to the circular no. 173/2013 dated 18.11.2013 issued by NSE according to which, it was decided to have a common contract note across all segments and across all exchanges. The said circular required all the members to issue common contract note in the prescribed format from 01.04.2014. Assessee thus submitted that the common contract note containing assessee's transactions across all segments were issued by C D Equifinance Pvt. Ltd. (CDEFPL) because of the mandatory regulations of the stock exchanges.

4.9. Before the Ld. CIT(A) it was also submitted that Ld. AO has made reference to transactions undertaken by the assessee with CDEFPL which was also controlled and managed by the assessee himself. It was submitted that this company also had undertaken similar types of transactions both in trading and investment portfolios with separate DMAT accounts with the same depository participants of CDSL since AY 2005-06. Similar dispute arose in the case of CDEFPL on the classification of income which was set at rest by the Hon'ble jurisdictional High Court of Calcutta in its case in appeal No. ITAT 214 of 2016 along with GA No.2794 of 2016 wherein

it was held that since the assessee maintained clear distinction between the transactions in respect of trading shares and investment which was accepted by the revenue in prior years it was not open for the department to assess the income under the head "Profits and Gains of Business". The relevant findings of the Hon'ble High Court are extracted as under:

> *"The legal issue sought to be raised by the Revenue in the first of these appeals pertains to the treatment of an amount of Rs.3,67,36,507/- as business income earned on transfer of shares held by the assessee for a period of less than 12 months.*
>
> *On such aspect of the matter, the Commissioner (Appeals) went into the accounts of the assessee as presented and discovered that though the assessee was engaged in the business of dealing in shares, the assessee had maintained separate accounts of the assessee's status as an investor and in the assessee carrying out share transaction business.*
>
> *The Commissioner noticed that the dispute was only with the correct classification of 'the head of income for the relevant amount: according to the Assessing Officer, the sum was assessable as business income; but according to the assessee, it was assessable as a short-term capital gain. After referring to several Supreme Court judgments for the proposition that every acquisition by a dealer in a particular commodity cannot be presumed as an acquisition for the purpose of his business, the Commissioner (Appeals) delved into the facts and found that the assessee regularly followed the principle of "lower of the cost or market value" for the purpose of valuing the inventory of shares, while investments were always carried in the balance-sheet "at cost. The Commissioner discovered that the method of inventory adopted by the assessee was different in case of investment and trading stock. The Commissioner also referred to the distinction between the share trading business and the investment of the assessee having been accepted by the Assessing Officer in previous years.*
>
> *On facts, the Commissioner (Appeals) concluded that even the Assessing Officer did not believe that the assessee was a dealer in shares in so far as the shares were held in the books of the assessee as investment.*
>
> *Since the enquiry conducted by the Commissioner (Appeals) was purely on facts and the answer arrived at by the Commissioner was that on the basis of the books of account and the facts as relevant, the sum of about Rs.3.67 crore could not be regarded as a business income, there is no serious question of law that has been raised by the Revenue herein. Further, the Appellate Tribunal reappraised the findings on facts rendered by the Commissioner (Appeals) and endorsed the view taken by the Commissioner (Appeals).*

> *In view of the concurrent finding on facts by the two for a below and there being no substantial question of law raised in such regard, ITAT No. 214 of 2016 along with GA No. 2794 of 2016 are dismissed."*

4.10. It was also pointed out that with effect from AY 2009-10, the AOs themselves accepted the differentiation between investment and trading portfolios in the assessment of CD Equifinance Pvt. Ltd. and did not assess the gain disclosed under the head STCG as business income. It was thus submitted that when on the same and identical facts, the Ld. AO of CDEFPL following the appellate orders for earlier years assessed the income under the head "capital gains", there was no reason for the Ld. AO in the case of the assessee to take a contrary view.

5. In the appeal before us, ld. Counsel submitted that assessments for AY 2011-12 to 2014-15 were reopened and assessed u/s. 147 of the Act wherein the returned income of the assessee has been accepted as the assessed income and no reclassification has been done of treating the capital gains reported by the assessee in its return as business income by the Ld. AO. Copy of the assessment orders for all these four years are placed in the paper book. All the four orders are dated 27.12.2018 which have been passed by the same officer who has passed the impugned order u/s. 143(3) of the Act dated 28.12.2017. Ld. Counsel vehemently argued and submitted that the same person on the same issue has taken divergent views without bringing any cogent and positive material on record to demonstrate any variation in the facts and circumstances as well as the applicable law.

5.1. Ld. Counsel also referred to the order of Coordinate Bench of ITAT, Kolkata in assessee's own case in respect of appeal filed by the assessee for the said four assessment years i.e. AYs 2011-12 to

2014-15 against orders passed u/s. 263 of the Act in which also a similar issue was raised and the Coordinate bench was pleased to allow the appeal of the assessee by quashing the order passed u/s. 263 of the Act. The Coordinate Bench in para 17 noted that assessee has duly explained that separate portfolios were maintained and trading and investment transactions were carried out in separate DMAT accounts from the very beginning and that there was no bar for the assessee to carry out both the trading and investment activities. Relevant extracts of the said order of Coordinate Bench is reproduced as under:

> *"16. We have considered the rival contentions. As noted above, we find that the show cause notice issued by the Ld. PCIT u/s 263 of the Income Tax Act, 1961 is the verbatim copy of the reasons recorded by the Ld. AO u/s147 of the Act. It has also been established that during re-assessment proceedings u/s147 of the Act, the Ld. AO had done detailed enquiry and the assessee had duly explained that separate portfolios for trading and investments were maintained by the assessee. The transactions were carried out in separate D-mat accounts and shares were received in the separate d-mat account. Therefore, there was no question of any manipulation. After duly verifying the explanations of the assessee, the Ld. AO accepted/assessed the assessee's returned income. However, subsequently on the proposal of the Ld.AO, the Ld.PCIT, without applying his mind to the above factual position, exercised his revision jurisdiction u/s 263 of the Act. The Ld. PCIT has not pointed out any discrepancy/error in the reply/explanation so submitted by the assessee during the re-assessment proceedings, which was part of the assessment records.*
>
> *17. In this case, the Ld. PCIT has resorted to the revision proceedings u/s. 263 of the Act in a mechanical manner on the basis of the proposal of the Ld.AO. It has not been pointed out as to what error has been committed by the Ld.AO in accepting the explanation/evidences so furnished by the assessee in the process of verifying the nature of transactions. Even the CBDT' s Circular cited by the Ld. PCIT in his order, in fact, comes to the support the assessee. As the assessee has duly explained that separate portfolios were maintained and trading and investments transactions were carried out in a separate d-mat accounts from the very beginning and that there was no bar for the assessee to carry out both the trading and investment activities.*
>
> *In view of above, the impugned order passed u/s. 263 of the Act by the Ld. PCIT, in this case, is, therefore, not sustainable and the same is accordingly quashed.*
>
> *The appeal filed by the assessee(ITA No. 122/Kol/2021 for the A.Y 2011-12) is hereby allowed."*

5.2. By referring to the treatment by the department u/s. 147 as well as u/s. 263 of the Act for the preceding four assessment years

i.e. 2011-12 to 2014-15 on the same issue which is before the Hon'ble Tribunal in the present appeal, it was strongly submitted that even though principle of res judicate is not applicable yet principle of judicial consistency is applicable to tax proceedings. It was submitted that it is evidently demonstrated and is already on record that assessee is a dealer as well as an investor in shares for more than three decades. There has been clear distinction between the two portfolios i.e. investment and trading which has been maintained by the assessee in his books of accounts as well as by maintaining two distinct DMAT accounts.

6. Ld. Counsel referred to the decision of Gopal Purohit Vs. JCIT 228 CTR 582 (BOM.) wherein the Hon'ble High Court of Bombay affirmed the decision of Coordinate Bench of ITAT, Mumbai which had held that although principle of res judicate does not strictly apply to the income tax proceedings, yet principles of consistency is to be followed wherein there is no change in the modus operandi of the assessee in the relevant year as compared to the earlier years and the AO cannot disturb the facts permeating through the years and take an altogether new stand. Ld. Counsel also placed reliance on the decision of Hon'ble Supreme Court in the case of CIT Vs. Excel Industries Ltd. CA No. 125 of 2013 dated 08.10.2013 wherein also the Hon'ble Court observed that there was no reason to adopt the different view unless there is a change in factual matrix permeating through the orders or legal provisions of the Act. It was submitted that Ld. CIT(A) has given a detailed meritorious findings on all the aspects of the case as noted in para 4 of the said order and held that AO should have assessed the income at Rs.18,36,89,703/- as also the gain of Rs.22,898/- under the head

"Capital Gains" and not "Profits and gains of Business". Aggrieved, the department is in appeal before the Tribunal.

7. Ld. CIT, DR placed reliance on the order of the Ld. AO. Ld. Counsel for the assessee reiterated the submissions made before the Ld. CIT(A) and also referred to the reassessment orders passed u/s. 147 of the Act by the same Ld. AO for the preceding four years. He also referred to the decision of the Coordinate Bench of ITAT, Kolkata in assessee's own case against the order passed u/s. 263 of the Act for the same four preceding years and pointed out that both, in the reassessment as well as revisionary proceedings in the immediately preceding four years, returned income of the assessee has been accepted as the assessed income with no reclassification being done for the capital gains as reported by the assessee into profits and gains of business. The submissions reiterated by the ld. Counsel are not reproduced which are already narrated in detail in the above paragraphs.

8. We have given our thoughtful considerations on the submissions made, detailed findings given by the Ld. CIT(A) on all the aspects of the case and orders of reassessment and revisionary proceedings for the immediately preceding four years placed in the paper book. Admittedly, it is a fact on record that assessee has maintained two separate and distinct DMAT accounts for his two portfolios of investment and trading in shares for past several years. Also, assessee has transacted in the two portfolios in distinct manner from the respective DMAT accounts and has accordingly maintained his books of account based on which respective income has been reported in the return of income. It has also been demonstrated evidently that there is no change in the material facts and circumstances as well as the applicable law in the year under

consideration when compared with the preceding years, more particularly four assessment years from 2011-12 to 2014-15 wherein in the reassessment proceedings u/s. 147 of the Act the returned income has been accepted as the assessed income without any reclassification of income. Also, the coordinate bench of ITAT, Kolkata in assessee's own case for the same four assessment years had quashed the order passed u/s. 263 of the Act on the same issue raised by the Pd. Pr. CIT in respect of reclassification of income from capital gains to business income. We also take note of the decision of the Hon'ble jurisdictional High Court of Calcutta in the case of CDEFPL (supra) in whose case, on identical fact pattern, the Hon'ble High Court held in favour of the assessee disregarding the reclassification of capital gains into profit and gains of business done by the department. Considering all of the above, we do not find any reason to interfere with the findings given by the Ld. CIT(A) and, therefore, uphold his order. Accordingly, grounds taken by the revenue are dismissed.

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

Order pronounced in the Court on 22nd November, 2022.

Sd/-	Sd/-
(SANJAY GARG)	(GIRISH AGRAWAL)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Kolkata, Dated 22/11/2022

JD. Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-09, Kolkata.
5. विभागीय प्रतिनिधि, अधिकरण अपीलीय आयकर , कोलकाता/DR,ITAT, Kolkata,
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Assistant Registrar
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