

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

SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 363/MUM/2021
(Assessment Year: 2005-06)

Gibs Computers Limited,
121, 1st Floor, Radha Bhuvan,
Nagindas Master Road, Fort,
Mumbai - 400023
[PAN: AABCG0096L]

..... Appellant

Deputy Commissioner of Income-tax,
Central Circle-7(1), Mumbai,
Aayakar Bhavan, M.K. Road,
Mumbai - 400020

Vs

..... Respondent

Appearances

For the Appellant/Assessee : Shri Rajiv Khandelwal
For the Respondent/Department : Shri Om Prakash Rastogi

Date of conclusion of hearing : 10.11.2022
Date of pronouncement of order : 23.01.2023

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant has challenged the order, dated 19.02.2021, passed by the Ld. Commissioner of Income Tax (Appeals)-49, Mumbai [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2005-06 whereby the Ld. CIT(A) had dismissed the appeal against the Assessment Order, dated 29.12.2017, passed under Section 143(3) read with Section 254 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').
2. The Appellant has raised following grounds of appeal:

"The Commissioner of Income-tax-49, Mumbai (hereinafter

referred to as the CIT(A) erred in upholding the action of the Deputy Commissioner of Income-tax, Central Circle 7(1), Mumbai (hereinafter referred to as the Assessing Officer) in considering short-term capital gains Rs. 56,61,041/- as business income on the ground that the original contract note-cum bill could not be produced by the appellant.

The appellant contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in considering the short-term capital gains Rs. 56,61,041 as business income inasmuch as the Assessing Officer has not correctly appreciated the facts of the case in its entirety.

Without prejudice, the CIT(A) erred in not adjudicating on the action of the Assessing Officer not allowing set-off of brought forward business loss against the business income assessed by him for the year under reference.

3. This is the second round of litigation. In the first round the Tribunal had, vide order dated 23.05.2016, remitted the issue in appeal back to the file of the Assessing Officer with specific directions. The grievance of the Appellant is that the Assessing Officer had failed to implement the aforesaid directions issued by the Tribunal while passing the Assessment Order, dated 29.12.2017, under Section 143(3) read with Section 254 of the Act, and that the CIT(A) had, while passing order dated 19.02.2021, erred in confirming the order passed by the Assessing Officer and dismissed the appeal preferred by the Appellant herein leading to the filing of the present appeal before the Tribunal.
4. We have considered the rival submissions and perused the material on record including the order dated 23.05.2021, passed by the Tribunal in ITA No.3844/MUM/2021. The relevant extract of the aforesaid decision of the Tribunal read as under:

"4. We have gone through the facts of this case. With the assistance of the parties we have examined the contract notes submitted before the Assessing Officer in the case of M/s Netscape Software Pvt Ltd, claimed to be group company of the assessee which was assessed by the same Assessing Officer. A perusal of the contract note shows that the impugned shares were mortgaged with Madhavpura Mercantile Co-operative Bank Ltd and these were sold through M/s JM Morgan Stanley Retail Services Pvt. Ltd. The shares were kept by the said company and were handed over to the said party. There was clearly an exchange of delivery on behalf of the assessee. Under these circumstances, we find that the said transaction is neither speculative nor it becomes business income merely on the ground that payment of security transaction tax was not paid on the impugned transaction. Similar transactions have been accepted by the Assessing Officer as "Income from capital gains" all along. There was no basis to make different treatment for the impugned transaction is held to be "Income from capital gain" and non speculative in nature. However, to meet the ends of justice, we sent this issue back to the file of the Assessing Officer for the limited purpose of verification of the contract notes as has been shown to us by the Id. counsel of the assessee. The Assessing Officer shall objectively take into account the documentary evidence as may be submitted by the assessee before the Assessing Officer and shall decide the issue afresh in the light of guidelines given by us above. Thus, grounds 2 & 3 may be treated as allowed, for statistical purpose." (Emphasis Supplied)

5. On perusal of the above, it can be seen that the Tribunal had concluded that the transaction of sale of shares resulted in capital gains income of INR 56,61,041/- which could not be classified as speculative business income. However, the issue was sent back to the file of Assessing Officer for the limited purpose of verification of the '*contract notes shown to the Tribunal*' by the Learned Authorised Representative for the Appellant. The Assessing Officer was directed to objectively take into consideration evidence, if any, produced by the

Appellant before the Assessing Officer and decided the issue afresh in the light of the aforesaid guidelines. We note that the Assessing Officer has again, vide order dated 29.12.2017, held that income of INR 56,61,041/- arising on sale of shares was in the nature of speculative business income as the Appellant has failed to produce the original contract notes. The CIT(A) has gone a step further while confirming the order passed by the Assessing Officer by holding that the Appellant has failed to satisfy the Assessing Officer regarding genuineness of the transaction by not furnishing original contract notes. In our view, both, the Assessing Officer and the CIT(A) have failed to appreciate the directions issued by the Tribunal and exceeded their jurisdiction. The Tribunal had sent the matter back to the Assessing Officer to verify the '*contract notes as has been shown*' to the Tribunal. Thus, the Tribunal had concluded that the income was in the nature of capital gains and thereafter, had directed the Assessing Officer to verify the photocopies of the contract notes which were produced before the Tribunal. It was not open to the Assessing Officer or the CIT(A) to again examine the nature of income or to ask for original contract notes. The decision of the Tribunal has attained finality. Therefore, we set aside the order, dated 29.12.2017, passed by the Assessing Officer and the order dated 19.02.2021, passed by the CIT(A). We remit the issue back to the file of the Assessing Officer for passing order strictly in compliance with the directions issued by the Tribunal, vide order dated 23.05.2016, after giving Appellant a reasonable opportunity of being heard. The Assessing Officer shall endeavor to pass the order at the earliest given the fact that this would be the third round of litigation.

6. In the result, the present appeal is allowed for statistical purposes.

Order pronounced on 23.01.2023.

Sd/-
(B.R. Baskaran)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 23.01.2023
Alindra, 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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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