

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'A' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

ITA No. 1755/DEL/2022 [A.Y 2007-08]

Shri Bhuwaneshwar Prasad Singh
10-G, DCM Building,
16, Barakhamba Road
New Delhi

Vs.

The I.T.O
Ward - 52(5)
New Delhi

PAN: ADOPS 9838 F
(Applicant)

(Respondent)

Assessee By : Shri S.K. Tulsian, Adv
Ms. Sonam Bajoria, CA
Ms. Parnashree Banerjee, Adv

Department By : Shri Kanv Bali, Sr. DR

Date of Hearing : 22.05.2023
Date of Pronouncement : 24.05.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is directed against the order of
the NFAC, Delhi dated 16.06.2022 pertaining to A.Y 2007-08.

2. The sum and substance of the grievance of the assessee is that the NFAC erred in confirming the assessment order dated 31.03.2018 framed u/s 143(3)/254 of the Income-tax Act, 1961 [the Act, for short], thereby denying the claim of long term capital gain and confirming the addition of Rs. 80,32,765/- added as undisclosed income by the Assessing Officer.

3. Representatives of both the sides were heard at length. Case records carefully perused. Relevant documentary evidences brought on record duly considered in light of Rule 18(6) of the ITAT Rules

4. This is not the first round of litigation. In the first round of litigation, assessment was framed u/s 143(3) of the Act vide order dated 29.12.2009, wherein the returned income of the assessee at Rs. 57,15,384/- was assessed at Rs. 1,37,48,149/-, inter alia, treating the short term capital gains of Rs. 45,97,508/- as 'business income' of the assessee and treating the long term capital gains of Rs. 80,32,765/- as 'income from undisclosed sources'.

5. Assessment was challenged before the Id. CIT(A) and the Id. CIT(A), vide order dated 18.5.2011, in Appeal No. 176/2009-10 treated the short term capital gains as such, and directed the Assessing Officer to treat the long term capital gains as such.

6. The revenue preferred appeal before the Tribunal and this Tribunal, in ITA No. 3807/DEL/2011 confirmed the findings of the Id. CIT(A) in so far as treatment of short term capital gains as such is concerned. However, in so far as the issue relating to the long term capital gains is concerned, the Tribunal restored the matter to the file of the Assessing Officer with the following directions:

“From the materials presently available before us, it is not possible to conclude whether the shares claimed to have been sold by the assessee are exactly the same as the shares claimed to have been purchased by the assessee - as far as assessee's claim of long term capital gain is concerned. As relevant facts for adjudication of this issue are not presently available; in the fitness of things, we set aside the orders of Ld.CIT(A) and AO on this issue and restore the issue in dispute in the second ground of appeal to the file of the AO with the direction to pass a fresh order denovo after carrying out necessary inquiries and after providing opportunity to the assessee.

For statistical purposes, the second ground of appeal is partly allowed.”

7. Pursuant to the directions of the Tribunal, the Assessing Officer once again dismissed the claim of long term capital gains and treated the gains of Rs. 80,32,765/- as ‘income from undisclosed sources’, which was confirmed by the Id. CIT(A).

8. Purchase transactions can be understood from the following chart:

Date of purchase	No. of shares	Broker Name	Purchase Price	Payment made on	Payment amount	Credited /received in demat account	
						No of shares	Date
04.05.2005	16000	Vasundra capital and securities Ltd. Kanpur	27,18,563.20	29.09.2006	27,18,563.20	8000	11.10.2006
						8000	13.10.2006
							11.12.2006
							13.12.2006
10.05.2005	3900	Rich Udyog Network Ltd	6,63,000.00	12.05.2005 14.12.2006	26000 6,37,000.00	3550	
						350	
Total	19,900	33,81,563.20		33,91,563.20			

9. Sales have been made as under:

Date of sale	No of shares	Average sale price per share	Broker name	Sale price [Without STT	Out/Debited in Dmat account on
12.10.2006	8000	573.00	Mefcom Securities Ltd	45,78,806.00	13.10.2006
10.10.2006	8000	574.00	Mefcom Securities Ltd	45.87.940.00	11.10.2006
13.12.2006	350	547.00	Mefcom Securities Ltd	1,91,492.00	14.12.2006
11.13.2006	3550	579.00	Mefcom Securities Ltd	20,56,090.89	12.13.2006
Total				1,14,14,328.89	

10. The entire quarrel revolves around the fact that though the shares were purchased on 04.05.2005 and 10.05.2005, but the payments were made on 29.09.2006, 12.05.2005 and 04.12.2006.

11. The stand of the Revenue is that it is not acceptable that brokers accepted the payments much after the date of purchase, though in both the rounds of litigation, the Assessing Officer has accepted that the shares were actually purchased and sold by the assessee through DEMAT account, but raised serious questions in so far as payment date is concerned.

12. Further, the Assessing Officer sought details of distinctive numbers of purchase of shares. Though this direction was given by this Tribunal in the first round of litigation, but with our utmost respect to the co-ordinate bench, this direction was irrelevant and could not have been carried out by any authority under any circumstances as the shares purchased were transferred to the DEMAT Account and there is no question of any distinctive number of shares.

13. It is a settled proposition of law that the law does not contemplate or require the performance of an impossible Act - *lex non cogit ad impossibilia*. The Securities Exchange Board of India [SEBI], under FAQ of 'Dematerialization' more than one and a half decade ago, had clarified that "*dematerialized shares do not have any distinctive numbers. These shares are fungible, which means that all the holdings of a particular security will be identical and interchangeable.*"

14. Thus, asking the assessee to provide distinctive numbers would be an impossible task to perform. The undisputed fact is that the shares have been purchased as per contract notes and the CBDT, vide Circular No. 704 dated 28.04.1995 has clarified as under:

“22. Instructions regarding determination of the 'date of transfer' and holding period for purposes of capital gains qua transactions in securities

1. Under the provisions of clause (424) of section 2 of the Income-tax Act, 1961, the shares held in a company or and other security listed in a recognized stock exchange in India or units of the Unit Trust of India or units of a mutual fund specified under section 10(23D) shall be regarded as short-term capital assets if they are held by an assessee for not more than 12 months immediately preceding the date of its transfer. Clarifications have been sought as to which date should be regarded as the date of transfer and also about the date from which the holding period of the securities should be reckoned. Clarifications have also been sought as to how the holding periods will be computed for the purposes of capital gains when the securities, purchased in several lots at different points of time and which are taken delivery of in one lot, are subsequently sold in parts and no correlation of the dates of purchase and sale is

2. When the securities are transacted through stock exchanges, it is the established procedure that the brokers first enter into contracts for purchase/sale of securities and thereafter, follow it up with delivery of shares, accompanied by transfer deeds duly signed by the registered holders. The seller is entitled to receive the consideration agreed to as on the date of contract. The Board are of the opinion that it is the date of broker's note that should be treated as the date of transfer in cases of sale transactions of securities provided such transactions are followed up by delivery of shares and also the transfer deeds. Similarly, in respect of the purchasers of the securities, the holding period shall be reckoned from the date of the broker's note for purchase on behalf of the investors. In case the transactions take

place directly between the parties and not through stock exchanges the date of contract of sale as declared by the parties shall be treated as the date of transfer provided it is followed up by actual delivery of shares and the transfer deeds.

3. *As regards the second issue, where securities are acquired in several lots at different points of time, the First-in-first-out (FIFO) method shall be adopted to reckon the period of the holding of the security, in cases where the dates of purchase and sale could not be correlated through specific numbers of the scrips. In other words, the assets acquired last will be taken to be remaining with the assessee while assets acquired first will be treated as sold. Indexation, wherever applicable, for long-term assets will be regulated on the basis of the holding period determined in this manner.”*

15. From the above, it is abundantly clear that it is the date of broker's note that should be treated as date of transfer in cases of sale transactions of securities, provided such transactions are followed up by delivery of shares and also transfer deeds. Similarly, in respect of purchasers of securities, holding period shall be reckoned from the date of broker's note for purchases on behalf of investors.

16. Contract notes clearly show the date of purchase as 04.05.2005 and 10.05.2005. Purchases are duly reflected in the financial accounts for F.Y. 2005-06 ending on 31.03.2006. Merely because payments were made

to the brokers on subsequent dates would not make the entire gains as income from undisclosed sources, not by any stretch of imagination. Since the purchases and sales of shares have not been disputed, and are supported by demonstrative evidences, we do not find any logic/justification in treating the gain as income from undisclosed sources.

17. Considering the facts of the case in totality, we direct the Assessing Officer to consider the gains as long term capital gains as per provisions of law.

18. In the result, the appeal of the assessee in ITA No. 1755/DEL/2022 is allowed.

The order is pronounced in the open court on 24.05.2023.

Sd/-

**[CHALLA NAGENDRA PRASAD]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 24th May, 2023.

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	