

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI**

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No.1661/Del/2020
Assessment Year: 2015-16

ACIT Circle – 58 (1) New Delhi	Vs	Neeraj Aggarwal 104, Banarasi Dass Estate Timarpur, New Delhi- 110054 PAN No.AAEP A8375J
(APPELLANT)		(RESPONDENT)

Appellant by	Ms. Smita Singh, Sr DR
Respondent by	Sh. Kapil Goel, Advocate Sh. Sandeep Goel, Advocate

Date of hearing:	24/07/2023
Date of Pronouncement:	27/07/2023

ORDER

PER N. K. BILLAIYA, AM:

This appeal by the revenue is preferred against the order of the CIT(A)-30, New Delhi dated 12.02.2020 pertaining to A.Y. 2015-16.

2. The grievance of the revenue read as under :

1. *On the facts and in the circumstances of the case, the order of the Ld. CIT(A) is bad in law and not in consonance with facts of the case.*

2. *On the facts and in the circumstances of the case, the decision of the Ld. CIT(A) to hold the transactions in shares on Short Term Capital Gain and not business income as held by the Assessing Officer, is not correct in law and facts.*

3. *Whether for application of Rule of consistency, the facts and circumstances in the respective years have to be identical*

4. *Whether in absence of such categorical of facts & circumstances of different years to show identity, finding of the CIT(A) is erroneous.*

5. *The appellant craves leave to add/ alter/delete / modify the grounds of appeal before or during the hearing of appeal.*

3. Briefly stated the facts of the case are that the assessee filed his return of income for the year under consideration on 30.09.2015 electronically declaring total income of Rs.38369697/- and after reducing deduction of Rs.162500/-the net income was declared at Rs.38207200/-. The return was selected for scrutiny assessment and accordingly statutory notices were issued and served upon the assessee.

4. While scrutinizing the return of income the AO noticed that the assessee has shown short term capital gains u/s.111A. The nature of income earned by the assessee was out of the purchase and sale of shares.

5. On perusal of the details the AO was of the opinion that the impugned income is not short term capital gains but business income. The AO based on his findings solely on the period of holding of the shares. According to the AO period of holding is an important criterion in deciding the nature of portfolio.

6. The AO also found that the assessee has very higher frequency buy and sell thereby indicating that the assessee is spending a lot of his time during the said transaction.

7. The AO found that in A.Y.2013-14 the percent of short term gains to total income was 79.04 % which was 24.67% in A.Y. 2014-15 and has risen to 88.24% for the year under consideration.

8. Referring to the CBDT circular No.4/2007 dated 15.06.2007, the AO treated the STCG as profit and gains of business and profession and completed the assessment.

9. The assessee challenged the assessment before the CIT(A) and pointed out that the AO has erred in analysis of period of holding. It was explained that no doubt the period of holding was less but the intention of the assessee was that of investor and not a trader.

10. After considering the facts and the submissions and verifying the status of assessment under similar facts in previous

assessment years and subsequent assessment years the CIT(A) observed as under :-

“In view of the above, it is clear that the A.O. in the earlier assessment years and in the subsequent assessment years has been consistently accepting the stand of the appellant and the income from trading of shares has been treated as short term capital gain. As pronounced in the above judicial verdicts, since the assessee has followed a consistent practice in regard to the nature of activity, the manner of keeping records and the presentation of shares as investment at the end of the year, in all the years it is held that there ought to be uniformity in treatment and consistency when the facts and circumstances are identical. Accordingly, in the case of the appellant the income arisen from sale of shares is the income under the head ‘short term capital gain’ and not from the head ‘business income’. Accordingly, ground Nos. 1 till 3 are hereby allowed.”

11. Before us the DR strongly supported the assessment order and read the relevant operative part of the assessment order.

12. The Counsel for the assessee reiterated what has been stated before the lower authorities.

13. We have given a careful consideration to the orders of the authorities below and have considered the documentary evidences brought on record in the light of rule 18 (6) of the ITAT rules. At the very outset we have to state that in the immediately preceding assessment year and also in subsequent assessment

year on similar high value transaction the AO has accepted the profits as short term capital gains.

14. It would be pertinent to mention to the observations of the Hon'ble High Court of Delhi in the case of Prem Kumar Chopra in W.P.(C) 12104 /2023 order dated 25.05.2023 wherein the Hon'ble High court has highlighted the importance of the rule of consistency and the same read as under :-

“1. Cogent and consistent answering to every “why” is the DNA of demosprudence. Consistency of not just the content of reasoning, but consistency of also the anvil on which the process of reasoning rests are antedote to the vice of arbitrariness. Every decision making authority, be it judicial or administrative, being public servant is accountable to the State and its subjects. Consistency, both in content and in procedure has to be adhered to in order to ensure predictability of the decisions. The absence of consistency and the consequent unpredictability of the decisions, both judicial as well as administrative leads to cynicism in the society. In order to ensure procedural and content consistency in decisions, every decision making authority should ensure that in a given set of circumstances, their decision must be on same lines as that of their predecessor or co-ordinate authorities in similar set of circumstances. Where a decision making authority finds itself unable to agree with the view earlier taken, by the predecessor or the co-ordinate, the authority concerned is duty bound to record cogent reasons for deviating. Significance of precedence cannot be ignored even in administrative decision making.

1.1 Two sets of identical circumstances pertaining to the assessment years 2015-16 and 2016-17, but same decision making

authority, rendering two decisions inconsistent with each other is what faces us in this writ action.

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6.3 Thence, under same set of circumstances and in the backdrop of similar set of documentary evidence, the concerned ACIT, pertaining to the assessment year 2016-17 dropped the proceedings, while pertaining to the assessment year 2015-16 opted to proceed further under Section 148 A of the Act. It would also be significant to note that in order dated 28.07.2022, while dropping the proceedings, the ACIT concerned recorded his analysis of the documentary material; but in the subsequent order dated 31.07.2022, while deciding to proceed further under Section 148A of the Act, the same ACIT recorded not even a whiff of analysis, if any, carried out by him of the documentary record and simply reiterated the allegations borne out of the alleged admission of Shri Rajeev Khushwaha.

7. There is no dispute to the legal proposition as submitted by counsel for respondents revenue that the doctrine of res judicata does not apply to income tax proceedings pertaining to different assessment years since each assessment year is a separate assessment unit in itself if rests in separate factual scenario.

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8. The issue before us is the consistency (or lack thereof) in the decision making. There was nothing wrong if in the impugned order dated 31.07.2022 the ACIT concerned had taken a view different from the view taken in order dated 28.07.2022, provided the diversion was supported by way of cogent reasoning. As mentioned above, consistency does not mean putting iron fetters on the

subsequent decision making; it only means expecting that a deviation from the previous decision in similar set of circumstances is explained by way of cogent and rational reasons. In the present case, the decision taken first in point of time (order dated 28.07.2022) was a reasoned decision, based on the analysis of material on record, but the decision taken subsequently (order dated 31.07.2022) not just took a view completely inconsistent with the previous view but even without an iota of reason.

9. *So far as the respondent's argument of two different sanctioning authorities is concerned, no doubt order dated 28.07.2022 was issued with the approval of Principal Commissioner Income Tax-10 and order dated 31.07.2022 was issued with the approval of Principal Chief Commissioner of Income Tax, but the satisfaction recorded in both orders' was of same Assistant Commissioner of Income Tax. There is nothing on record to suggest even feebly that the latter sanctioning authority was apprised of the earlier view taken in order dated 28.07.2022. An assessee, deals with the income tax department as a whole, like a body and not its individual organs, especially where left hand does not know what right hand sanctioned.*

10. *In nutshell, the impugned notice and order suffer who infirmities, namely the same proceed on a view inconsistent with the earlier order despite the facts and circumstances being similar and the ACIT concerned did not support the said subsequent divergent view with reasoning.*

11. *In view of the above discussion, we are unable to uphold the impugned notice and order dated 31.07.2022 under Section 148 of*

the act so the same are set aside and accordingly the petition is allowed. No costs.

15. Considering the past and future assessment history of the assessee in the light of the decision of the Hon'ble Jurisdictional High Court of Delhi (supra) we do not find any reason to interfere with the findings of the CIT(A). The appeal filed by the revenue is dismissed.

Order pronounced in the open court on 27.07.2023.

Sd/-

[ASTHA CHANDRA]
JUDICIAL MEMBER

Dated:27.07.2023

Neha

Copy forwarded to:

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

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Asst. Registrar
ITAT, New Delhi