

IN THE INCOME TAX APPELLATE TRIBUNAL

NAGPUR BENCH, NAGPUR

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND

SHRI K.M. ROY, ACCOUNTANT, MEMBER

ITA No. 201/Nag./2017
(Assessment Year : 2010-11)

Dayal Agro Products Ltd.
Dayal House, New Radhakisan Plots,
Akola.
PAN : AABCD2713R

..... Appellant

v/s

Joint Commissioner of Income Tax,
Akola Range, Akola

..... Respondent

Assessee by : Shri K.P.Dewani, Advocate
Revenue by : Shri Rajeev Benjwal, CIT DR.

Date of Hearing – 09/07/2024

Date of Order – 16/07/2024

ORDER

PER K.M.ROY, A.M.

The present appeal has been preferred by the assessee challenging the impugned order dated 06/03/2017, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax, (Appeals)-1, Nagpur, ["*learned CIT*"], for the assessment year 2010-11.

2. The assessee has raised the following grounds of appeal:—

“1. That on the facts and in the circumstances of the case the learned CIT Appeal has erred in confirming disallowance of short term capital loss of Rs. 3.59 crore.

2. That on facts of the case disallowance of short term capital loss of Rs.3.59 crores is unjustified as the A.O. has not brought any evidence/material on record to establish that the sale transaction is not genuine. The disallowance on the basis of surmise, conjuncture is uncalled for and deserves to be allowed

3. Any other ground(s) that may be raised during the course of hearing of the appeal.

3. The solitary ground of dispute is whether CIT(A) has erred in confirming disallowance of short term capital loss of Rs.3.59 crores.

4. The fact of assessee’s case as contained in the assessment order is reproduced below:

“5.From the computation of the total income, it is found that the assessee has claimed Short Term Capital Loss of Rs.3.59 crore on sale of 2,10,000 shares of M/s. Dayal Energy and Proteins Ltd. These shares were purchased by the assessee for consideration of Rs.4.01 crores in October, 2008 which were subsequently transferred on 30/04/2009; 30/06/2009 and 01/09/2009 to the family members and/or existing shares holders for a consideration of Rs.42 lacs. The assessee was required to explain as to why the shares were sold out on loss within the short span of period. A copy of the balance sheet of M/s. Dayal Energy and Proteins Ltd., as on 31/03/2009 and 31/03/2010 was also obtained and placed on the records. It is seen therefrom that there was a surplus in the Profit & Loss account of Rs.31,900/- as at 31/03/2009 and Rs.12,35,230/- as at 31/03/2010. The balance sheet did not indicate any other negative factors for reduction in the value/price of the shares of this company computed on break up method being a closely held company. The assessee was also further required to explain as to why the loss should not be disallowed in as much as the shares were transferred to the family members and/or existing shareholders of the group and not to any outsider. In this regard, the assessee filed the explanation vide letter dt. 01/11/2012.”.

5. Being aggrieved, the matter was carried to CIT (Appeals). The assessee has made a detailed submission before the CIT(A) as contained in

paras 4.1 and 4.2 of the CIT(A)'s order. On the other hand, the CIT(A) was not convinced with such submission and confirmed the addition by observing as follows:

“5. Appellant’s submissions alongwith assessment order and records have been considered carefully. Various case laws, as relied on by the appellant, have also been perused. There is no denying the fact that both the purchase and sale of 2,10,000 shares of M/s. Dayal Energy and Proteins Ltd., a sister concern – have been done as per board’s resolution of the appellant company. At the same time, it is to be noted that these shares, which have been purchased for Rs.4,01,00,000/- in October-2008 have been sold to family members/existing shareholders within a short span of 6-8 months for nominal consideration of Rs.42,00,000/- only. The only evidence and justification given by the appellant at both stages of proceedings i.e. assessment as well as appeal, is the copy of its own board resolutions justifying the alleged purchase and sale of these shares. It is further noted that the said M/s Dayal Energy and Proteins Ltd., has shown total sales of Rs.8,98,000/- for the year ending on 31.03.2009 i.e. year of purchase of shares by the appellant alongwith other income of Rs.74,763/- declaring net profit before tax of Rs.47,296/- only. The appellant has not explained as to why the said huge investment of Rs.4,01,00,000/- in its closely held company has been made in the first place by it. The appellant has not been able to prove any commercial or business exigencies nor submitted any evidence of any income or return earned by it on the said capital investment which has resulted into alleged claimed STCL. On the other hand, for the year ending 31.03.2010 i.e. Year of sale of shares, M/s Dayal Energy and Proteins Ltd has declared net profit before tax at Rs.14,24,999/- from sales of Rs.97,46,12,710/- and other income of Rs.98,26,487/- thereby making appellant’s explanation of poor performance/ loss by it to justify the sale of these shares as devoid of merits. Also no evidence has been filed in support of basis for arriving at value of these shares at Rs.20/- per share which had earned premium of Rs.190/- per share when being purchased by the appellant company on 01.10.2008 i.e. just 8-9 months ago. No doubt, the money has been routed through banking channels but this fact alone does not reflect genuine business transaction. The profit motive, as normal in case of investment, is also found entirely absent. Any person, who would invest money or give loan, would certainly seek return or income as consideration which is not found in existence in the instant case. These are undoubtedly relevant and material facts to ascertain the genuineness of alleged share capital transactions. All these facts show that alleged share transactions are not genuine. There has been surrounding evidence and material manifesting and revealing involvement of the appellant in the ‘transactions’ which has not been found entirely arm’s length transactions. It would be incorrect to state that the onus to prove genuineness of the transaction stands discharged in all cases if payments are routed through banking channels. Whether or not onus is discharged depends upon facts of each case. It depends upon whether the two parties are related or

known to each; the manner and mode by which the parties approached each other, whether the transaction was entered into through written documentation to project the investment; whether the investor progresses and was an angle investor; the quantum of money, creditworthiness of the recipient, and object and purpose for which payments/investments was made etc.”

6. The solitary ground involved in this appeal is to whether the short term capital loss claimed to have been carried forward for the assessment year 2010-11 amounting to Rs.3.59 crores can be disallowed by the AO holding the same to be bogus and sham. The AO has primarily swayed by the fact that within a short span of time, shares costing Rs.4.10 crores were disposed at Rs.42 lakh only. Basically, he is doubting the amount of consideration because such amount is very low and the same is not backed up by any corroborative evidence as to the independent fair valuation or was to say arms' length price of sale of shares has been established beyond doubts.

7. In the course of hearing before us, the reliance was made on the following judgments.

- [1] (1973) 87 ITR 0349 (SC)
CIT VS. Daulat Ram Rawatmull
- [2] (1983) 144 ITR 0352 (Karn.)
Bedi & Company Pvt. Ltd. Vs. CIT
- [3] (1998) 230 ITR 0580 (SC)
CIT vs. Bedi & Co. Pvt. Ltd.
- [4] ITAT Order in ITA No. 30/Nag/1998 in the case of
Alok Ferro Alloys Ltd vide order dt. 17/04/2006
- [5] (2007) 288 ITR 0001 (SC)
S.A.Builders Ltd vs. CIT (A) & Anr.

8. We also gone through the copy of acknowledgment of the Income Tax Return for the assessment years 2018-19 and 2019-20. We find that u/s 74 of the I.T. Act, 1961, short term capital loss can be carried forward for maximum period of 8 years, to be set off against future capital short term gain. Bu, till 2018-19 no such set off has been claimed and the carried forward loss must not have for set off after assessment year 2018-19. Thus, the loss so claimed has not been adjusted against any income. There is no loss to the exchequer. At this point of time, we posed a question to the Id.AR as to why this appeal is maintainable in view of the fact that the appellant is not at all aggrieved by way of any additional tax demand. Shri K.P. Dewani, Advocate, as usual, argued vehemently that since the A.O has invoked initiation of penalty u/s 271(1)(c) of the I.T. Act, 1961, there is always a possibility of contingent loss and damage for which the appellant is aggrieved. We find merit in the submission and allowed the process to ride the cycle of adjudication.

9. On the other hand, the Ld. CIT DR submitted that the order of CIT(A) is very cogent and legally sustainable and there is no need to interfere with the same. However, we put a question to him as whether there is any mechanism in the Act to disturb the full value of consideration of Rs.42 lakh, which has attained the finality because the same was never doubted in the hands of the purchasers. He submitted that in view of the circumstantial evidences, the department has onerous power to disturb the value of consideration. But, he failed to point out the empowering provision in the Act.

10. We find that in the matter of **Alok Ferro Alloys Ltd. (supra)**, exactly similar issue was considered by the Hon'ble Nagpur Bench, which held in unequivocal terms in Paras 11 to 14 as follows;

"11. Considering the rival submissions, we are of the view that appeal by the assessee is to be allowed. Assessee is a company manufacturing ferro alloys. The shares purchased by the assessee are from the company which is in the field of chemical and engineering. Page 10 to 13 of the paper book is a letter by the assessee to the Assessing Officer, there is a specific mention in this letter that there was a discussion between B.R.Agrawal, director of Alok Ferro Alloys Ltd., Raipur and Shri D.Bhattacharya, director of M/s DHPL, Raipur. The discussions are recorded in writing on 10.04.1993, in which it was agreed on following terms:-

[a] induction of Shri B.L.Agrawal on the Board of M/s. Dinesh High Polymers Ltd.,

[b] purchase of equity shares of DHPL worth Rs.7,00,000/-.

[c] to report day to day progress on the functioning of the company to Alok Ferro Alloys Ltd., through Shri B.L.Agrawal.

12. Shri B.L.Agrawal, the director of the assessee company was appointed as additional director as on 27.07.1993 to play an important role in the project implementation, expansion and marketing. Under these circumstances, if the assessee invested in M/s. DHPL it cannot be held as bad idea from the point of view of a businessman. The mere failure of an attempt which is legal cannot be treated as purchase of loss simpliciter. Assessee purchased the shares within the span of 2-3 months and sold immediately. Before that, it is to be noted that one of the director of the assessee company was also tipped to be appointed as an additional director of M/s. DHPL. This fact is clear from the discussion as noted in Para 11. Merely because the assessee incurred loss in certain operations, it is difficult to hold that it is an attempt to purchase loss so as to defraud the revenue.

13. We have already noted the decisions relied by the learned counsel and we are of the view that transaction itself was not illegal. If the transactions are not illegal or done with sole intentions of defrauding the revenue, such venture cannot be treated as falling within the scope of decision in the case of McDowell (cited supra). In the case of DCIT vs. Kashyap Sweetners (P) Ltd. (cited supra), wherein the Tribunal, Indore Bench, while relying upon the observation of the Hon'ble Supreme Court in the case of Azadi Bachao Andolan, reported in 263 ITR 706 (SC) observed as under:-

"The court finds that notwithstanding a series of legal steps taken by an assessee, the intended legal result has not been achieved, the court might be justified in overlooking the intermediate steps, but it is not permissible

for the court to treat the intervening legal step as non-est based upon some hypothetical assessment of the real motive of the assessee. An act which is otherwise valid in law cannot be treated as non-est merely on the basis of some under lying motive supposedly resulting in some economic detriment or prejudice to the national interests. While commenting on the words sham' and 'device', it was observed that "these words are not intended to be used as magic Mantras or catch all phrases to defect or nullify the effect of a legal situation and following para of Lord Atkin from Duke of Westminster's case (supra) was reproduced. "I do not use the word device in any sinister sense: for it has to be recognized that the subject, whether poor and humble or wealth and noble, has the legal heirs right so to dispose of his capital and income as to attract upon himself the least amount of tax, the only function of a Court of law is to determine the legal result of his disposition so far as they affect tax.

14. It is seen from the record that the factum of purchases of shares is not disputed by A.O. The payment for purchases of shares is made by account payee cheques as is evident from the assessment order. The disallowance made by A.O. is for the reason that loss is suffered with a view to avoid taxation and same is not borne out of record. In the case of assessee the purchase of shares is made by making payment of full consideration at Rs.7,00,000/- directly by issue of shares by company. The said shares have been sold to Shri Goverdhan Agrawal at Rs.70,000/-. The company has suffered loss of Rs.6,30,000/-. The transaction of purchase and sale of shares stand fully corroborated from the register of members maintained by the company under the Companies Act, 1956. The annual return submitted by Dinesh High Polymers Ltd. fully corroborates the transaction of purchase and sale of shares by assessee company. Shri Goverdhan Agrawal is assessed to income tax and the purchase of shares is duly reflected in the individual income tax return of Shri Governdhan Agrawal. On above admitted facts on record we are of the view that the observation of CIT(A) that it is an colourable devise cannot be approved. The shares which are sold by assessee company is not disputed by A.O. as well the consideration received. The disallowance of loss only for the reason that it results into avoidance of tax cannot be approved. We are of the opinion that the genuineness of transaction of shares cannot be doubted, only for the reason that it reduces the burden of taxation and such a conclusion in our view is unjustified. The observation of the revenue authorities that it is a devise is not well founded. There is no evidence on record to show that at the time of purchase the assessee had any intention to incur loss on shares. The transactions are through proper banking channel and genuineness of the same cannot be doubted. The decision of purchase and sale of shares has to be viewed from the point of view of businessman and not form the subjective standards of revenue. The various decisions relied upon by the counsel of assessee fully supports the case of assessee.

15. Considering the facts brought on record, we are of the view that it is difficult to hold, the only intention of the assessee was to purchase loss and thereby cause loss to exchequer. The assessee's adventure may be in bad taste and it ultimately resulted in a loss. But that is not sole test for allowing or not allowing a deduction. Considering the fact that 1 year prior to the purchase of the shares one of the Director of the assessee company was agreed to be made additional director of M/s. DHPL, the purchase of shares by the assessee is to be treated as a genuine business adventure. The assessee tried to turn the share seller company into good performance company. The directors experience and understanding of the market also tried to be exploited. But the attempt did not gain the desired result. There is nothing illegal or illogical. The purchase of shares cannot be taken as devoid of any business acumens. The purchase of shares of loss making company and becoming the Board member of the company cannot be termed as mere attempt to purchase loss. Considering the facts and circumstances of the case, we are of the view that the addition made by AO and sustained by the CIT(A) at Rs.6,30,000/- is unjustified and deserves to be deleted. We therefore direct to delete the addition made by AO at Rs.6,30,000/- on account of disallowance of loss on sale of shares. Hence, this ground of appeal by the assessee is allowed.”

We respectfully follows the line of reasoning adopted by the Co-ordinate Bench.

11. Further, the special provision considers fair market value as full value of consideration for transfer of unquoted shares has been brought into effect from assessment year 2018-19 under Section 50CA of the I.T. Act, 1961. This section specifically provides that where consideration for transfer of unquoted shares is less than fair market value of such share determined in accordance with the prescribed manner, the fair market value shall be deemed to be the full value of consideration for the purpose of concluded income under the head “capital gain”. This amendment will apply from assessment year 2018-19 and subsequent assessment years. It is clear in that assessment year 2010-11 under reference that no addition can be made by resorting to Section 50CA. Further, u/s 48 of the I.T. Act, 1961, to calculate “capital gain”, costs of acquisition has to be deducted from full value of consideration. Full value of consideration means the actual consideration

received and there was no provision to tinker with such full value of consideration in the impugned year. Accordingly, disallowance of Rs.3.59 crores has no legal legs to stand upon. We direct the A.O. to delete the same. Accordingly, the appeal of the assessee is allowed.

12. In the result, the assessee's appeal is allowed.

Sd/--
V. DURGA RAO
JUDICIAL MEMBER

Sd/--
K.M. ROY
ACCOUNTANT MEMBER

NAGPUR, DATED: 16/07/2024.

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Nagpur; and*
- (5) *Guard file.*

True Copy

By Order

Rajesh V. Jalit
Private Secretary

Sr. Private Secretary
ITAT, Nagpur