

**| आयकर अपीलीय अधिकरण न्यायपीठ, मुंबई |**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"D" BENCH, MUMBAI**

**BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER**  
**&**  
**SHRI SANDEEP SINGH KARHAIL, HON'BLE JUDICIAL MEMBER**

**I.T.A. No. 3299/Mum/2024**  
**Assessment Year: 2013-14**

<b>Shri Ravi Jakhar</b> B2302, Oberoi Esquire Oberoi Garden City Goregaon East Mumbai - 400063 <b>[PAN: AFQPJ0074A]</b>	Vs	<b>Asstt. Commissioner of Income Tax, Circle-35(2), Mumbai</b>
<b>अपीलार्थी/ (Appellant)</b>		<b>प्रत्यर्थी/ (Respondent)</b>

Assessee by :	Shri Madhur Agrawal & Shri Fenil Bhatt, A/R
Revenue by :	Smt. Mahita Nair, Sr. D/R

सुनवाई की तारीख/**Date of Hearing** : 19/08/2024  
घोषणा की तारीख/**Date of Pronouncement** : 21/08/2024

**आदेश/ORDER**

**PER NARENDRA KUMAR BILLAIYA, AM :**

This appeal by the assessee is preferred against the order dated 09/05/2024, by NFAC, Delhi, [in short "ld. CIT(A)"] pertaining to Assessment Year 2013-14.

2. The grievance of the assessee reads as under:-

*"1.1. On the facts and in circumstances of the case and in law, the Learned National Faceless Appeals Centre ("Ld. NFAC") erred in confirming the treatment of the Learned Asst. Commissioner of Income tax - Circle 35(2) ("Ld. AO") in classifying sale of shares as short term capital asset instead of long term capital asset as treated by the Appellant and, consequently, taxing the gain arising from the transfer of the shares as short term capital gain.*

*1.2. The Appellant prays that the Ld. AO be directed to treat the sale of shares as a long term capital asset and, consequentially, the gain arising from such transfer be taxable as long term capital gain.*

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1.3. *The Appellant further prays that the Ld. AO be directed to allow the Appellant "indexed cost of acquisition" as per second proviso to section 48 of the Act.*

2.1. *On the facts and in the circumstances of the case and in law, the Ld. NFAC erred in confirming the disallowance of deduction under section 54F of the Act made by the Ld. AO amounting to Rs. 2,16,47,059.*

2.2. *The Appellant prays that the Ld. AO be directed to allow deduction under section 54F of the Act amounting to Rs. 2,16,47,059.*

3.1. *On the facts and in the circumstances of the case and in law, the Ld. NFAC erred in confirming the addition made by the Ld. AO under section 69 of the Act amounting to Rs. 2,98,600 of cash deposits as unexplained investment.*

3.2. *The Appellant prays that the Ld. AO be directed to delete the addition of Rs. 2,98,600 made under section 69 of the Act.*

4.1. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in charging interest under section 234B and under section 234C of the Act.*

4.2. *The Appellant prays that the Ld. AO be directed to delete interest charged under section 234B and 234C of the Act or be appropriately reduced, in accordance with law.*

*The Appellant craves leave to amend, alter, modify and add any further grounds of appeal, if required."*

3. Briefly stated the facts of the case are that the assessee electronically filed his return of income on 31/07/2013 declaring total income at Rs.50,97,941/-. The return was selected for scrutiny assessment and accordingly, statutory notices were issued and served upon the assessee. During the course of the scrutiny assessment proceedings, the AO observed that the assessee had sold shares and earned long term capital gains and further claimed deduction u/s 54F of the Act. The assessee was asked to furnish details to prove that the shares were long term capital gain. The assessee filed detailed reply explaining the date of investment in the impugned shares, the details of sale of shares, how the capital gains were computed and how the

exemption u/s 54F of the Act was claimed. After considering the detailed submissions of the assessee, the AO was of the opinion that the holding period of shares is less than 36 months as the holding period is 31 months. Drawing support from the provisions of Section 2(42A) of the Act, the AO came to the conclusion that the impugned sale of shares gave rise to short term capital gain and taxed the same accordingly and since the gains were treated as short term capital gain, the claim of exemption u/s 54F of the Act was also denied.

3.1. Proceeding further, the AO noticed that the assessee has deposited cash total to Rs.3,08,600/- and found that the assessee has no explanation and added the same u/s 69 of the Act.

3.2. The assessee agitated the matter before the ld. CIT(A) but without any success.

4. Before us, the ld. Counsel for the assessee drew our attention to the provisions of Section 2(42A) of the Act and pointed out that the AO and the ld. CIT(A) have wrongly applied the amended provisions as the same was not applicable for the assessment year under consideration. It is the say of the ld. Counsel that the impugned shares even if held for 31 months are long term capital asset as per the unamended provisions of Section 2(42A) of the Act and, therefore, the capital gain arising out of the sale of such shares give rise to long term capital gain eligible for exemption u/s 54F of the Act.

4.1. Insofar as the deposit of cash is concerned, it is the say of the ld. Counsel that the returned income of the assessee is more than Rs.50 Lakhs and the sale consideration of shares is more than Rs.2 Crores and, therefore, the cash deposit of Rs.3,08,600/- should not be questioned.

The ld. D/R strongly supported the findings of the AO and the ld. CIT(A) and read the operative part of the assessment order.

5. We have given a thoughtful consideration to the orders of the authorities below. The undisputed fact is that the holding period of the impugned shares is around 31 months. It is true that provisions of Section 2(42A) of the Act has been amended to exclude the holding period of unlisted shares being held for 12 months to be treated as long term capital gain but the said amendment has come from AY 2015-16 and applicable therefrom and since the impugned AY is 2013-14, therefore, the amended provisions is not applicable.

5.1. A similar dispute was considered by the Hon'ble High Court of Madras in the case of *CIT vs. Exim Rajathi India (P) Ltd.* [2021] 438 ITR 19 (Mad.). The relevant findings read as under:-

*"9. The definition of "short-term capital asset" as defined under section 2(42A) as it stood at the material time reads as follows: –*

*'Section 2(42A):*

*"Short-term capital asset" means a capital asset held by an assessee for not more than (thirty-six) months immediately preceding the date of transfer:*

***Provided** that in the case of a share held in a company (or any other security listed in a recognised stock exchange in India or a unit of the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963) or a unit of a Mutual Fund specified under clause (23D) of section 10 (or a zero coupon bond), the provisions of this clause shall have effect as if for the words "thirty-six months", the words "twelve months" had been substituted.*

*Explanation (1). - .....'*

*10. In terms of the above definition, short term capital asset would mean a capital asset held by an assessee for not more than 36 months immediately preceding the transfer. The interplay of the provision in section 2(42A) would be relevant for the case on hand, which states that in case of a share held in a company or any other security listed in a recognized stock exchange in India or a unit of the Unit Trust of India or a unit of a Mutual Fund or a zero coupon bond, the provisions of the clause shall have effect as if for the words "thirty-six months", the words "twelve months" had been substituted.*

*11. What is important to note is to use the word "or" in between each of the categories of items mentioned in the proviso. The first of which being shares held in company. The provision does not make a distinction between a public company, a private*

company, a listed company or an unlisted company. The second category is "other securities" and a condition has been imposed under the statute that for the benefit of the reduced period of twelve months, the other securities should be listed in a recognized stock exchange in India. This is precisely the reason for which the amendment has been brought above and this is clear on a reading of the explanatory notes, which states that in order to provide such units and all the securities traded in the recognized stock exchanges a level playing field with company shares, the Finance Act has amended the provisions of section 2(42A) so that the maximum holding period for which such instruments are to be considered as short term will be twelve months in the place of thirty six months.

12. The argument of Mr.M.Swaminathan, learned Senior Standing Counsel is that the definition of "securities" as defined under section 2(h) of the Securities Contracts Act should be taken note of. This aspect has also been dealt with by the Tribunal and it was held that although under the Securities Contracts Act, the term "securities" includes shares, but in section 2(42A) of the Act, shares have been mentioned separately. As pointed out earlier, the use of the word "or" in between each of the categories of holding is very important and such distinction needs to be borne in mind. It may be true that "securities" as defined under section 2(h) of the Securities Contracts Act includes shares, scripts, stocks, bonds etc., that by itself cannot have an impact to give a different interpretation to the distinction of "short-term capital asset" as defined in section 2(42A) of the Act.

13. In *Mohan Virwani v. Dy. CIT* [2014] 51 taxmann.com 43/227 Taxman 131 (Mag.) (Kar.), the question which fell for consideration was whether the shares held by the assessee is a short term capital asset or a long term capital asset. The assessee in the said case, acquired shares in November 1993 and sold the shares in June, 1996, the period of holding was less than thirty six months. The assessee claimed benefit under section 2(14) of the Act claiming that the shares is a long term capital asset. All the three authorities held that the period of holding for thirty six months would apply in the case of shares for a company listed in the stock exchange in India and the shares of the said assessee are of a private limited companies, which are not listed shares in the stock exchange. Therefore, all the shares of a private limited company would have to be construed as thirty six months only and therefore, the shares cannot be treated as short term capital gain and accordingly, taxed. Aggrieved by the same, the assessee approached the High Court of Karnataka. While answering the question, the Court took into consideration the definition of "short-term capital asset" as defined under section 2(42A), the circular issued by the Central Board of Direct Taxes (CBDT) bearing Circular No. 684 dated 10-6-1994 and pointed out that the shares held in a company, which may be a private limited company, a public limited company or a listed company or any other security other than those shares listed in a recognized stock exchange in India, if it is held for a period of twelve months, then it ceased to be a short term capital asset and it becomes a long term capital asset. Therefore, the Court pointed out that the authorities have not kept this distinction in mind and they have misread the section and accordingly, the appeal filed by the assessee was allowed. The above decision would apply with full force to the case on hand warranting answering of the substantial question of law in favour of the respondent-assessee.

14. Identical issue came up for consideration before the Income-tax Appellate Tribunal (ITAT), Delhi Bench in the case of *Analjit Singh v. Dy. CIT* [2018] 92 [taxmann.com](http://taxmann.com) 310. Two of the issues, which were framed for consideration by the ITAT were (i) whether the CIT(A) erred on facts and in law in observing that for unlisted shares to qualify as "long term capital asset", the period of holding was 36 months and not 12 months as per the first proviso to section 2(42A) (as applicable during the year under consideration) read with section 2(29A) of the Act; and (ii) Whether the CIT(A) erred on facts and in law in holding that the shorter period of 12 months to qualify as "long term capital asset" was only applicable to unlisted shares sold during the period 1-4-2014 to 10-7-2014, in terms of second proviso to section 2(42A), which was inserted by the Finance (No.2) Act, 2014, with effect from 1-4-2015.

15. We find from paragraphs 85 to 87 of the order, which have crystallized the arguments of the learned counsel appearing for the assessee and the Revenue and we find those arguments to be substantially similar to the arguments, which were advanced before us. The ultimate conclusion arrived at by the ITAT was that so far as the term used 'shares held in a company' is concerned, there is no category mentioned as listed or unlisted shares, albeit the condition for being listed in recognized stock exchange in India is for 'any other security'. The expression listed in a recognized stock exchange in India is only used for category of 'any other security' and not for the category of 'share held in a company'. Further after taking into consideration that the condition for the period of holding was curtailed from 36 months to 12 months by the Finance Act, 1987, it was only for 'share held in a company'. Further, when the amendment by the Finance Act, 1994 was brought in the statute so far as the category 'shares held in a company' was concerned, the same was not disturbed, albeit, new category was included like 'any other security listed in recognized stock exchange in India'. Further, the ITAT took note of the Memorandum explaining the provision in the Finance Bill and observed that the Memorandum clearly makes a distinction that there are many financial instruments other than the company shares through which the investor are entering capital market and in order to provide such units and all securities traded in the recognized stock exchange, a level playing field with the company's share is proposed to be amended and thus, the said Memorandum clearly makes a distinction between the company shares and other than company shares.

16. In our considered view, the above decision of the ITAT has laid down the correct legal principle which we have discussed in the preceding paragraphs.

17. On a search made, we find that the Revenue has not challenged the order of the ITAT before the Court, but it is the assessee, who has challenged it before the High Court of Delhi and obviously not against the above finding, which was rendered in favour of the assessee.

18. Further, we take note of the Explanatory Notes to the Provisions of the Finance (No.2) Act, 2014 vide Circular No. 01/2014, dated 21-1-2015. In paragraph 5.2 of the Circular, it has been stated as follows: –

"5.2 The shorter period of holding of not more than twelve months for consideration as short-term capital asset was introduced for encouraging investment on stock market where prices of the securities are market

*determined. However, all shares whether listed or unlisted have enjoyed the benefit of short period of holding and even any investment in shares of private limited companies enjoyed long-term capital gains on its transfer after twelve months....."*

*19. The above Circular issued by the CBDT will clearly indicate that all shares whether listed or unlisted have enjoyed the benefit of shorter period of holding and even any investment in shares of private limited companies enjoyed long-term capital gains on its transfer after twelve months.*

*20. For all the above reasons, the appeal filed by the Revenue is dismissed and the substantial question of law is answered against the Revenue and in favour of the assessee. No costs.*

6. Respectfully following the decision of the Hon'ble Madras High Court (*supra*), we set aside the findings of the Id. CIT(A) and direct the AO to treat the gains arising from sale of shares as long term capital gains. Since we have held that the capital gains to the assessee are long term capital gain, therefore, we direct the AO to re-consider the claim of exemption u/s 54F of the Act and decide the issue afresh as per the provisions of law, after affording reasonable and adequate opportunity of being heard to the assessee. Thus, these grounds are accordingly allowed.

7. Insofar as the cash deposit of Rs.3,08,600/- is concerned, the explanation of the assessee that the same has been received out of the petty loans given to friends and relatives, cannot be brushed aside lightly, considering the returned income of assessee being more than Rs.50 Lakhs and sale consideration being more than Rs.2 Crores. The returned income and the capital gain go on to show the status of the assessee and, therefore, deposit of petty sum of Rs.3,08,600/- on different dates should not be looked upon adversely.

7.1. Considering the facts and status of the assessee in totality, we direct the AO to delete the impugned addition of Rs.3,08,600/-. This ground is also allowed.

8. In the result, appeal of the assessee is allowed.

**Order pronounced in the Court on 21<sup>st</sup> August, 2024 at Mumbai.**

*Sd/-*  
(SANDEEP SINGH KARHAIL)  
JUDICIAL MEMBER

*Sd/-*  
(NARENDRA KUMAR BILLAIYA)  
ACCOUNTANT MEMBER

Mumbai, Dated 21/08/2024

*S.S.P.*

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)-
5. विभागीय प्रतिनिधि ,आयकर अपीलीय अधिकरण, मुंबई /DR,ITAT, Mumbai,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,  
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Assistant Registrar  
आयकर अपीलीय अधिकरण  
ITAT, Mumbai