

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C': NEW DELHI
BEFORE
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

ITA No. 1688/Del/2016, A.Y.2010-11)

&

ITA No. 2079/Del/2017, A.Y.2012-13)

Jagatpal Gupta 34, Sri Ram Road, Civil Lines, Delhi PAN : AAAPG3798D	Vs.	ACIT Circle-35(1) New Delhi
(Appellant)		(Respondent)

Appellant by	Sh. Samir Mahajan, CA
Respondent by	Shri Om Prakash, Sr.DR

Date of Hearing	17/10/2024
Date of Pronouncement	23/10/2024

ORDER

PER YOGESH KUMAR U.S., JM :

Both the captioned appeals are filed by the Assessee against the order of Ld. Commissioner of Income Tax (Appeals) ["Ld. CIT(A)" for short], dated 22/02/2016 & 28/02/2017 for the Assessment Year 2010-11 & 2012-13 respectively.

2. The grounds of Appeal are as under:

ITA No. 1688/Del/2016, A.Y.2010-11)

"1. That the Learned CIT (Appeals) has grossly erred by affirming the actions of Assessing Officer.

2. That the Learned CIT (Appeals) has further erred by affirming the decision of Assessing Officer of treating short term capital gain earned on sale fares held in Citi Bank DMAT A/c as income from business.

3. That the Learned CIT (Appeals) has further erred by ignoring certain important facts, documents and submissions, which were sufficient to prove the claim of the appellant as declared and she failed to appraise the facts properly. 4. That the Learned CIT (Appeals) has further erred by treating the declared short term capital gain as business income but did not re-compute the profit by adopting value of shares held as on close of the year on basis of cost or market value whichever is less. 5. That the Learned CIT (Appeals) has further erred by disturbing the consistency of the appellant for treating the transactions relevant to Citi Bank DMAT A/c as of investments in the subsequent years.

That the above grounds are without prejudice to each other.”

ITA No. 2079/Del/2017, A.Y.2012-13)

That the Learned CIT (Appeals) has grossly erred by affirming the actions of the Assessing Officer.

2. That the Learned CIT (Appeals) has further erred by affirming the decision of Assessing Officer of treating short term capital gain earned (on which STT paid) as part of business income.

3. That the Learned CIT (Appeals) further erred by confirming disallowance of Rs. 522036/- made by the Assessing Officer in terms of section 14A of Income Tax Act, 1961 read with Rule 8D of Income Tax Rules, 1962.

4. That the Learned CIT (Appeals) has further erred by treating the declared short term capital gain as business income but did not re-compute the profit by adopting value of shares held as on close of the year on basis of cost or market value whichever is less.

5. That the Learned CIT (Appeals) has further erred by disturbing the consistency of the appellant for treating the transactions relevant to Citi Bank DMAT A/c as of investments in the subsequent years.

6. That the Learned CIT (Appeals)-12 has further erred by not considering the evidences available for the deletion of additions/disallowances made by the Assessing Officer.

That the above grounds are without prejudice to each other.

The appellant craves leave to add, alter, amend or forego any of the grounds of appeal before or at the time of hearing.

(Assessment Year 2010-11)

3. Brief facts of the case are that, the Assessee filed return of income for Assessment Year 2010-11 showing net taxable income at Rs. 1,15,30,630/-. The income of the Assessee included Short Term Capital Gain on listed securities of Rs. 58,68,776/- and Short Term Capital Gain on listed securities (on which STT has been paid) of Rs. 58,68,776/-and Short Term Capital Gain on listed securities (on which no STT has been paid) of Rs.3064/- during the year. The total returned income of the Assessee also includes a sum of Rs 21,79,042/- being income from Business and Profession from trading of shares etc. The Assessing Officer treated the Short Term Capital Gain of Rs. 58,68,776/- as Profit from Business & Profession. The Assessing Officer framed the Assessment Order u/s 143(3) of income tax Act ('Act' for short), 1961 on 22.03.2013the short term capital gain of Rs 5868776/- has been taxed @ flat 30%. The Assessee filed an application for rectification u/s 154 as there were certain mistakes in the assessment order. The mistakes included non-adjustment of brought forward losses; non-adjustment of unabsorbed depreciation and non-

adjustment of eligible deduction under section 80G of the Act. The application for rectification has been disposed off vide order u/s 154/143(3) of the Act, on 03.09.2013, after the filing of appeal, and the demand created was reduced to Rs. 36,310/-.The Assessee preferred an Appeal challenging the assessment order dated 22/03/2013 before the CIT(A) which came to be dismissed vide impugned dated 22/02/2016. As against the order of the CIT(A), the Assessee preferred the present Appeal on the grounds mentioned above.

4. The Ld. Consul for the Assessee submitted that the Ld. CIT(A) committed error in affirming the decision of the A.O. of treating the Short Term Capital Gain earned on sale of shares held in City Bank D-mat account as 'income from business'. Further submitted that the Assessee had a D-mat account with HSBC for holding business investments and the Assessee decided to open a separate D-mat account for holding shares of the purpose of investment. Both the D-mat accounts as well as transactions were accounted separately in the books of accounts as well as the financial statement. The transactions in the D-mat account with City bank were of the investments and the D-mat account with HSBC are business and the Assessee never challenged any of its investments in shares/securities into stock-in-trade. Further submitted that the Ld. CIT(A) in the Appeal for Assessment Year 2011-12 filed by the Assessee, decided

the issue in favour of the Assessee by accepting the version of the Assessee and assessed the income under Short Term Capital Gain, therefore, submitted that the issue involved in the present Appeal deserves to be decided in favour of the Assessee by following the principle of consistency.

5. Per contra, the Ld. Departmental Representative relied on the orders of the Lower Authorities.

6. We have heard both the parties and perused the material available on record. Admittedly, the Assessee had two D-mat accounts one D-mat account is in HSBC Bank for holding business investments and the Assessee opened one more D-mat account on 20th August, 2009 for holding shares for the purpose of investment. The Ld. A.O. while making the addition observed that 'the volume and the frequency of transaction is more in the case of shares held as investment than the shares held as business and further alleged that the short period of holding suggests it to be business and the motive of the Assessee to earn profit and the Assessee made an artificial distinction in the nature of share transaction only to reap the benefit of low rate of taxation.

7. The Assessee contended and justified his claim of making distinction between the shares held as stock-in-trade and as investment are as under:-

“i) D-mat account with Citi Bank was opened on 28.08.2009 for making distinction and holding shares as investments. The D-mat

account with HSBC was being used for business transactions since its inception.

ii) D-mat account with Citi Bank has been held for purpose of investments only from its inception till date.

iii) The Books of accounts as well as financial statements have been prepared by considering the shares in Citi Bank D-mat account as of investment and shares in HSBC D-mat account as of business. The taxes have been computed and the return of income has been filed accordingly.

vi) 86% of shares held as investment were disposed off in the month of January on apprehension of fall in rates after declaration of budget.

v) The consistency of preparing financial statements and filing of income tax return maintained.

vi) The business stocks have been valued at cost or market value, whichever is lower, while the investments/ capital assets are being valued at cost.

vii) The Appellant was holding 65715 shares in investment portfolio at the close of the year and held 1839050/- shares at the close of the year under business portfolio. viii) Had the investment portfolio treated as business portfolio, the valuation would have been done on the basis of lower of cost or market price. This would have resulted in lower income by a sum of Rs 1,43,831/- (Calculation available at page 59 of Appeal Paper Book). The additional tax payable would have been NIL as the tax payable has been determined at Rs 36310/- (Refer page 49-50).

ix) Thus, there was no intention to defraud the revenue and the appellant has not engaged himself in any kind of tax avoidance measures.

x) To open a separate D-mat account for investments is the conclusive evidence of the intentions of the Appellant to purchase shares as investments and not as stock-in-trade.

xi) The income tax return or the income tax portal does not provide a facility to declare intentions at the time when the transaction takes place.

xii) The Appellant had paid more taxes due to having separate investment portfolio. The Appellant suffered losses in preceding years also because of reason of valuation of investments at cost. This fact has been accepted by CIT(A)-32 while allowing relief and accepting the profit as short term capital gain for the assessment year 2012-13 (refer page 86-96).

xiii) The appellant had declared business income only during the preceding years i.e. assessment year 2009-10 & 2008-09. No capital gain has been declared in those years as the investment portfolio started during the year, with the opening of D-mat account with Citi Bank on 28.08.2009 (refer page no. 100 – 104).

xiv) The purchases and sales of different portfolios are identifiable. The distinction of both portfolios is real as there are separate d-mat accounts.

XV) The appellant has maintained the consistency of distinction between the shares held as business shares as well as investment.

8. It is found that the very same addition has been made for Assessment Year 2011-12 by treating the Short Term Capital Gain earned on sale of shares held in City Bank D-mat Account as income from business which has been challenged by the Assessee before the CIT(A). The Ld. CIT(A) vide order dated 16/11/2015 held that the shares in City Bank D-mat Account were investment and resulting gain or loss for sale and purchase of shares therein will be Short Term or Long Term Capital Gain, accordingly directed the A.O. to treat the said amount as Short Term Capital Gain and not as

profit of business. The relevant portion of the order of the CIT(A) for Assessment Year 2011-12 is reproduced as under: -

“The assessee claimed that he is having two De-mat accounts since 1999-2000. These two De-mat accounts are separate and are used for two exclusive purposes i.e. one for investment and another for business. The assessee has never mixed these two De-mat accounts. TATA Steel shares (Investment) held in HSBC account was acquired prior to 1999-2000 when assessee was having only one De-mat account. The assessing officer has based his decision only on the basis of frequency of the transactions in the De-mat account. Frequency of transactions gives some indication about the nature of operation. But if somebody is doing purchase and sales of shares on regular basis and is taking delivery of shares in each and every case, we cannot declare it as a business unilaterally. The Act provides for short term capital gains. In short term capital gains one has to take delivery of the shares and holding of the shares can be as less as one or two days. It is therefore for the assessee to declare whether the shares in De-mat account are investment or stock in trade. However once the assessee has exercised this option, he is not free to change it at his will. In the present case the assessee has declared that the two accounts are different and are for specific purposes. One is for investment and other is for stock in trade. Assessee has been following this regularly since 1999-2000. The assessee has also pointed out that if the CITI bank De-mat account is held to be for business purpose then the stock therein should be valued at market rate or cost price whichever is lower. In this case the market rate as on 31/03/2011 was much lower than the cost of acquisition of the shares. If the shares held in CITI bank De-mat account are valued at market rate as on 31/03/2011 the assessee will incur a loss of Rs. 1202530/-. The assessee has taken this ground also that if CITI bank De-mat account is held to be for business purpose the assessee should be allowed to value the shares as on 31/03/2011 at market rate or cost whichever is lower. This will result in reduction of profit amounting to Rs. 1202530/-.

The assessee has valued the shares in CITI bank De-mat accounts a cost, whereas he himself has valued the shares in HSBC De-mat account at cost or market value whichever is lower. This clearly proves the bona fide of the assessee. Therefore it is

held that the shares in CITI bank De-mat account were investment and resulting gain or loss on sale and purchase of shares therein will be short term or long term capital gain. The A.O. is directed to treat Rs. 844351/- as short term capital gain and not as profit of business.”

9. The Assessee was holding D-mat account with Citi Bank for the purpose of investment from the date of inception to till date, the Books of accounts as well as financial statements have been prepared by considering the shares in Citi Bank D-mat account as of investment and shares in HSBC D-mat account as of business. The taxes have been computed and the return of income has been filed accordingly. The consistency of preparing financial statements and filing of income tax return maintained. The business stocks have been valued at cost or market value, whichever is lower, while the investments/ capital assets are being valued at cost. Apart from the same, the Ld. CIT(A) for Assessment Year 2011-12 treated the shares in City Bank D-mat account as investment and directed A.O. To treat the amount as Short Term Capital Gain and not as profit of business. In view of the same we are of the opinion that the Department has committed error in not following the principle of consistency. Finding the merits in the submission of the Assessee's Representative, we delete the addition made by the A.O. which has been confirmed by the CIT(A).

10. In the result, Appeal of the Assessee in ITA No. 1688/Del/2016 is allowed.

Assessment Year 2012-13

11. The Ground No. 1 & 6 are general in nature which requires no adjudication.

12. Ground No. 2, 4 & 5 are regarding treating the transaction in the City Bank D-mat Account as income from business. The said issue has already been decided in favour of the Assessee for Assessment Year 2010-11 (supra). Adopting the very same adjudication and the ratio, we delete the addition made by the A.O. which has been confirmed by the CIT(A), accordingly, Ground No. 2, 4 & 5 of the Assessee are allowed.

13. In Ground No. 3, the Assessee contended that the Ld. CIT(A) erred in confirming the disallowance of Rs. 5,22,036/- made by the A.O. in terms of Section 14A of the Act read with rule 8D of the Income Tax Rules, 1962.

14. Brief facts of the case are that, the Assessee earned exempt dividend of Rs. 37,43,933/- the A.O. calculated the disallowance at 0.5% of average investment of Rs. 10,44,07,321/- as per Sub Rule 2 of Rule 8D of the Rules, accordingly made disallowance of Rs. 5,22,036/-. The Ld. CIT(A) observed that the Assessee had incurred Long Term Capital Loss of Rs. 34,13,674/- which will be adjusted in future. Thus, provision of Section 14A of the Act are applicable on all investments where the Assessee earning exempt income, thereby sustained the addition. The Ld. Counsel for the Assessee

submitted that it is settled law that no disallowance can be made u/s 14A if there is no expenditure to earn exempt income and further submitted that the Courts have held no disallowance that the depreciation is a statutory allowance therefore, no amount u/s 14A of the Act disallowed for depreciation allowance claimed u/s 32 of the Act. Further submitted the disallowance u/s 14A of the Act cannot exceed the total expenditure of the Assessee. Following the plethora of Judgments sought for allowing the Ground No. 3

15. Per contra, the Ld. Departmental Representative relying on the orders of the Lower Authorities sought for dismissal of the Appeal filed by the Assessee.

16. We have heard both the parties and perused the material available on record. In the present case, the total expenditure claimed by the Assessee are to the tune of Rs. 1,59,158/- which includes depreciation of Rs. 97,842/-, in other words, the net expenditure amount is Rs. 61,316/- only thus, the disallowance can be made out of this expenditure of Rs. 61,316/- which cannot be to the tune of Rs. 5,22,036/-. Further the only expenditure for earning business income were claimed in the profit and loss account which is evident from the P & L Account produced by the Assessee at page No. 31 of the Paper Book. It is well settled law that no

disallowance can be made u/s 14A of the Act if there is no expenditure to earn exempt income as held in following Judgments:

a. COMMISSIONER OF INCOME TAX vs. HERO CYCLES LTD (2009) 77 CCH0989 PHHC

b. ASSISTANT COMMISSIONER OF INCOME TAX vs. SIL INVESTMENT LTD. (2012) 32 CCH 0057 Del Trib

17. Further it is well settled law that the depreciation is a statutory allowance and therefore, no amount u/s 14A of the Act to be disallowed for depreciation allowance claimed u/s 32 of the Act. The reliance is based on following Judgments: -

a. VISHNU ANANT MAHAJAN vs. ASSISTANT COMMISSIONER OF INCOME TAX (2012) 72 DTR 0217 (SB)

b. HOSHANG D. NANAVATI vs. ASSISTANT COMMISSIONER OF INCOME TAX (2012) 31 CCH 0302 Mum Trib

18. Further the disallowance u/s 14A of the Act cannot exceed the total expenditure as held in following Judgments:-

a. *JOINT INVESTMENTS PVT LTD. vs. COMMISSIONER OF INCOME TAX (2015) 92 CCH 0088 Del HC*

b. *PRINCIPAL COMMISSIONER OF INCOME TAX vs. ENVESTOR VENTURES LTD (2021) 431 ITR 0221 (Mad)*

c. *Deputy Commissioner of Income Tax VS Trade Apartment Ltd [TS-6741-ITAT- 2012(Kolkata)-O.]*

19. In view of the above facts and circumstances and following the ratio laid down in the above judicial pronouncements, we are of the opinion that the Ld. CIT(A) has committed error in confirming the disallowance of Rs. 5,22,036/- made by the A.O. in terms of Section 14A of the Act read with rule 8D of the Rules, accordingly, the said disallowance is hereby deleted.

20. In the result, the appeal of the Assessee in ITA No. 2079/Del/2017 is allowed.

Order pronounced in open Court on 23rd October, 2024

Sd/-

(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Dated: 23/10/2024

R.N, Sr. PS

Sd/-

(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT, NEW DELHI

