

IN THE INCOME TAX APPELLATE TRIBUNAL  
BENGALURU BENCH 'A', BENGALURU

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER

AND

SHRI. S. JAYARAMAN, ACCOUNTANT MEMBER

I.T.A No.1057/Bang/2015  
(Assessment Year : 2010-11)

Shri. Venkatesh Sharma,  
Sunrise Apartments, Flat No.303, Near Vijaya Bank  
Main Branch, Raichur 584 102 .. Appellant  
PAN : BHDPS4392E

v.

Income Tax Officer,  
Ward -4, Raichur .. Respondent

Assessee by : Shri. H. N. Khincha, CA  
Revenue by : Shri. G. R. Reddy, CIT-DR-I

Heard on : 18.10.2016  
Pronounced on : 25.01.2017

**ORDER****PER S. JAYARAMAN, ACCOUNTANT MEMBER :**

This appeal is filed by the assessee against the order passed u/s.263 by the CIT, Gulbarga, dt.05.02.2015, for the assessment year 2010-11.

02. Shri. Venkatesh Sharma, the assessee , is involved in purchase and sale of shares of various companies, has shown income from both speculation businesses & long term capital gains and claimed benefit under sec. 10(33). On perusal of records

and the statement of accounts, the CIT found that the assessment order passed for this a y on 12-03-2013 determining the total income at Rs. 5,66,360/- is erroneous, inter aila, briefly for the reasons set out below:

*From the details filed of purchase and sale of shares, it is seen that most of the shares were held for less than 36 months as detailed below, which were claimed as long term capital gains:*

Script	Purchase details		Sale details		
	Date of purchase	Qty	Date of sale	Qty	
Shilpa Medicare	31-07-2009	244	20-08-2009	2500	o/s was 60,250
	14-01-2010	200	02-09-2009	494	
	22-01-2010	300	24-12-2009	1000	
	27-01-2010	300	14-01-2010	200	
	03-02-2010	500	22-01-2010	300	
			25-10-2010	300	
			03-02-2010	150	
			11-02-2010	222	
			22-02-2010	5000	
			11-03-2010	714	
			12-03-2010	2826	
			17-03-2010	555	
			19-03-2010	1063	
			22-03-2010	5500	
			23-03-2010	1000	
			23-03-2010	350	
			Total sales	22674 Shares	

*From the above, it will be seen that the assessee had opening stock of shares of Shilpa Medicate numbering 60250 . During the year, he purchased additional shares of this co. numbering in all 1544 and sold them along with the opening stock of 60250 shares. At the end of the year, he is left with 39120 shares. He claimed the gains made from these sale as long term capital gains. The assessee wanted to take advantage of 60250 shares held at the beginning of the year and showed them as long term capital gain, on the contrary, he had purchased 1544 shares and sold them in the same year. Therefore, the sale*

of asset, ie 1544 shares, is clearly a short term capital asset as per Sec. 2(42A). Therefore, the entire income claimed of Rs. 44,76,676/- as exempt u/s. 10(38) on the plea that it is a long term capital gain is false and has to be withdrawn. It may be noted here that the assessee is an employee of Shilpa Medicare centre Raichur, and he has been involved in purchase and sale of shares of this concern as well as various other companies on regular basis and claiming exemptions every year. Thus, it is very much clear that what the assessee is doing is purchasing and selling the shares, on regular basis, and therefore it is a case of business, the shares are held as stock in trade and not as an investment so as to treat it as long term capital asset. This view gets support from various aspects found on perusal of case records viz.

1. The assessee has filed balance sheet as on 31-03-2010 wherein it is found that the value of shares held as on 31-03-2010 of Rs. 11,98,207/- is shown as closing stock and not as investments in capital asset. If it were really long term assets, the same should have been shown separately but the assessee has clubbed the same under his speculative business as shown below :

	Rs.		Rs.
To Opening Stock	4,77,159.78	By sale of shares	1,17,22,234
To purchase of shares	79,73,657.22	By short term loss	-9052
To long term capital gain	44,78,676	By closing stock	11,98,201
<b>Total</b>	<b>1,29,29,493</b>	<b>Total</b>	<b>1,29,29,493</b>

2. The assessee filed audit report u/s.44AB of the Act and as per clause 8 of the said report in form 3CD it is shown that he is "Trading - others-0204" and as per clause 12(a) of the same, he states that closing stock is valued at lower of cost or market rate.

3. *The assessee filed audit report u/s.44AB of the Act and as per clause 8 of the said report inform 3CD it is shown that he is "Trading - others-0204" and as per clause 12(a) of the same he states that closing stock is valued at lower of cost or market rate.*
4. *If the income earned is a long term capital gain, then there was-no need for the assessee to get his accounts audited u/s. 44AB because as per P&L account, the assessee has claimed business loss of Rs. 1,65,974/- which is made up of*
  - i. Expenses shown in P&L account Rs. 51,806/-*
  - ii. Divident Rs. 27,300/- and*
  - iii. Interest paid of Rs. 86,868/-.*

*In view of the above, it is very much clear that the assessee has been involved in purchase and sale of shares on regular basis and does not hold them as an investment. The shares are held as stock in-trade and as a result, the income earned there- on has to be brought to tax as business income. The principles laid down by Karnataka High Court in the case of CIT Vs Aravind Prakash Malpani, Bangalore, in ITA No. 113, of 2006, dated 04-01-2011 are kept in view. Therefore, there is no hesitation to come to an inescapable conclusion that the assessment order passed has been erroneous in so far as it is prejudicial to the interests of revenue and as such, the said order is set aside with a direction to reframe the assessment order suitably after collecting all the details.*

Aggrieved, the assessee filed this appeal with the following grounds:

1.1 The learned Commissioner of Income-tax, Gulbarga, has erred in assuming the jurisdiction u/s. 263 of the Act and passing the order in the manner passed by him. The order passed is bad in law and is liable to be quashed.

1.2 In any case the condition precedent for issue of notice u/s. 263 of the Act being absent, all the consequential proceedings also become bad in law and are liable to be quashed.

1.3 In any case and without prejudice, the impugned order as passed is beyond the scope of show cause notice issued u/s 263 of the Act and thus the impugned order is bad in law and is liable to be quashed.

2. In any case and without further prejudice, the issue considered in order u/s 263 of the Act, having been already dealt and considered by the Assessing Officer, would amount to change of opinion which is not permissible U/s. 263 of the I.T. Act. Hence, the impugned order is bad in law and is liable to be quashed.

3. In any case, there was no error in the original order passed on 12.03.2013 and no prejudice was caused to the interest of the revenue and therefore the issue of notice u/s. 263 of the Act and the consequent order passed u/s. 263 of the Act and thus the impugned order become bad in law and is liable to be quashed.

4.1 In any case, the Commissioner of Income-tax, Gulbarga, has erred in holding that the long term capital gains earned by the appellant ought to have been assessed as Business Income. Such a conclusion being contrary to both law applicable and the facts available is to be disregarded.

4.2 The Commissioner of Income tax has erred in holding that the shares should be held for more than 36 months for the purposes of considering the same as Long Term Capital Asset. Such a conclusion being against law and facts is wholly erroneous.

4.3 In any case, the various observations/findings made in the impugned order and ultimate conclusion drawn being contrary to each other makes the impugned order bad in law and is liable to be quashed.

5. The Commissioner of Income-tax has erred in setting aside the assessment with a direction to reframe the assessment. Such a direction being not in accordance with law, beyond the scope of notice issued u/s 263 of the Act makes the impugned order bad in law and is liable to be quashed.

03. There is delay in filing the appeal. The assessee pleaded that he was under a bonafide impression that once the assessment is reframed in pursuance of the directions u/s 263, then only the next course of action would begin but on due advise , he made due arrangement for filing the appeal and pleaded to condone the delay. We have considered the plea and condoned the delay.

04. The AR submitted that the AO raised a specific query, on the impugned issues by his letter dt 13.12.2012, considered the explanation and passed the assessment order. There is no error in the order, the condition precedent for issue of notice u/s 263 is absent, the order passed u/s 263 is mere change of opinion and it is beyond the scope and hence it should be quashed. Per contra, the DR submitted that it is seen from the assessment order and the order u/s 263 that the assessee has not filed any reply to the impugned query, nor the AO considered them nor the assessee brought such reply to the C's IT attention . From the facts set out in the order u/s 263 , it is clear that all the ingredients required u/s 263 are fulfilled and hence the order passed u/s 263 be sustained. We have considered the rival submissions and gone through relevant orders. It is clear that the AO has not examined the factual and legal aspects of the impugned issue and passed the assessment order and hence the order

passed u/s 263 is well within the scope of section 263. The assessee's appeal is dismissed.

05. In the result, the assessee's appeal is dismissed.

Order pronounced in the open court on 25<sup>th</sup> day of January , 2017.

Sd/-  
(SUNIL KUMAR YADAV)  
JUDICIAL MEMBER

Sd/-  
(S. JAYARAMAN)  
ACCOUNTANT MEMBER

MCN\*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income Tax
4. The Commissioner of Income Tax (A)
5. DR
6. GF, ITAT, Bangalore

By Order

Assistant Registrar