

IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA
BEFORE SHRI N.V.VASUDEVAN, JM & DR. A.L.SAINI, AM

आयकर अपील सं./ITA No.2315/Kol/2013

(निर्धारण वर्ष / Assessment Year : 2006-2007)

DCIT, Circle-10, Kolkata P-7, Chowringhee Square, 3 rd Floor, Kolkata-700069	Vs.	M.R. Rajaram, DLF Plaza Tower, 10 th Floor, DLF Qutub Enclave, Phase-1, Gurgaon, Haryana- 122002
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.: AFUPR 0894 L		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

AND

CO No.28/Kol/2016

(निर्धारण वर्ष / Assessment Year : 2006-2007)

M.R. Rajaram, DLF Plaza Tower, 10 th Floor, DLF Qutub Enclave, Phase- 1, Gurgaon, Haryana- 122002	Vs.	DCIT, Circle-10, Kolkata P-7, Chowringhee Square, 3 rd Floor, Kolkata-700069
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AFUPR 0894 L		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से /Revenue by : Shri Saurabh Kumar, Addl.CIT DR
निर्धारिती की ओर से /Assessee by : Shri Anup Sinha, AR
सुनवाई की तारीख / **Date of Hearing** : **11/04/2017**
घोषणा की तारीख/**Date of Pronouncement** **28/04/2017**

आदेश / O R D E R

Per Dr. Arjun Lal Saini, AM:

The captioned appeal filed by the Revenue, and Cross Objections filed by the assessee, pertaining to assessment year 2006-07, are directed against the order passed by the Id. Commissioner of Income Tax (Appeals)-XII Kolkata, in appeal No.333/CIT(A)-XII/Cir-10/2008-09 dated 14.05.2013, which in turn arises out of an order passed by the Assessing

Officer (AO) under Section 143(3) of the Income Tax Act, 1961 (in short the Act), dated 10.12.2008.

2. The appeal filed by the Revenue and the cross objections filed by the Assessee relate to the same assessee, same assessment year, common issues involved, therefore, these have been clubbed and heard together and a consolidated order is being passed for the sake of convenience.

3. Brief facts of the case qua the assessee are that the assessee had filed his return of income on 28.7.2006 showing total income of Rs.1,93,58,950/-. The assessee's return of income was processed u/s.143(1) of the Act on 15.06.2007. Later on, the assessee's case was selected for scrutiny u/s.143(2) of the Act and the AO has completed the assessment by making the addition on account of short term capital gain (STCG) and long term capital gain(LTCG) shown by the assessee. While making the addition on account of STCG and LTCG at Rs.2,12,27,162/- the AO observed that the assessee has engaged during the previous year in purchase and sale of shares of securities/mutual funds. The assessee acquired large quantity of shares and subsequently disposed the same in a systematic manner to earn profits. It may be noted that purchase and sale of shares have yielded profits to the assessee, therefore, the AO held that the assessee is engaged in the business of dealing in shares/mutual funds. The AO observed that the assessee had not made investment to derive the benefit by way of dividend etc. such as bonus, right issue

allotment, but these activities of the assessee will be in the nature of revenue receipts or business income. The AO also observed that in the case of assessee, there are substantial transactions and there is frequent purchase and sales of shares. The ordinary purchase and sale of shares with the motive of realizing profit would lead to inference of trade/adventure. The AO also observed that the assessee is making frequent purchases and sales, therefore, no any other conclusion can be drawn except that these shares were purchased and sold by the assessee with the motive of earning of profits by such purchase and sales and not with the object of investing its capital in these shares, in order to derive income from that investment. Therefore, considering the volume of transactions, the frequency of transactions, the systematic and organized manner of undertaking the transactions strongly pointed out the conclusion that the shares could not have been purchased as an investment to earn income from dividends and that the purchases of these shares were with the object of selling them subsequently at a profit. The AO also worked out disallowance under Section 14A, r.w. rule 8D at Rs.3,09,490/-, (i.e. under rule 8D(2)(iii) Rs.3,03,400/- and under Rule 8D(2)(i) Rs.6,090/-.)

4. Aggrieved from the order of Assessing Officer, the assessee filed an appeal before the Id CIT(A), who has deleted the addition made by the AO partly. Ld. CIT(A) observed that the activities of the assessee to purchase and sale of shares/mutual funds are not trading in shares and

mutual funds, rather it should be considered as investments. The Ld. CIT(A) further held that the purchases of shares and mutual funds in earlier years were accepted by the department as investment activity of the assessee. The assessee has not converted shares and mutual funds in stock-in-trade in the current assessment year. Further the CIT(A) held that the department has accepted the activity of assessee's dealing in share and mutual funds as investment for the past may years. The CIT(A) has also noted that the AR has brought on record the assessment orders passed in the scrutiny assessment of the assessee in later years where the department has again accepted assessee's claim of LTCG and STCG treating assessee's activity as investment then on same facts in one isolated year treating assessee's activity as trading activity is not justified.

5. Not being satisfied with the order of Id CIT(A), the Revenue is in appeal before us and has taken the following grounds of appeal:

1. Whether the Id CIT(A)-XII, Kolkata, was justified on facts and on law on accepting assessee's claim that his transaction in share, Mutual Fund etc is not business in nature, but investment without disqualifying the facts discussed by the AO?

2. Whether the Id CIT(A)-XII, Kolkata, was justified on law on partially accepting assessee's claim by rejecting the computation of disallowance U/s 14A read with Rule 8D of the I. Tax Act, 1961?

The Assessee filed the following Cross Objections(CO-28/16):

1. That on the facts and in the circumstances of the case and in law, the Id. Commissioner of Income Tax (Appeals)-XII, Kolkata erred in upholding disallowance under section 14A of the Income Tax Act at 1% of the total exempted income of Rs.20,06,800/- amounting to Rs.20100/- without appreciating that the appellant has no business income during the relevant assessment year and that the said provision is not applicable in computing income under the head capital gains.

6. Ground No.1 raised by the Revenue is that whether purchase and sale of shares, M.F. & Securities, is business income or Investment Income?

6.1 The Id DR for the Revenue has submitted before us that the transactions were skillfully made to overcome the risk which according to the AO would tantamount to maximization of gains/profits. This, according to the AO, proved that the assessee had carried on the transaction in a systematic and organized manner to earn business income. The Ld. DR further submitted that the assessee had entered into approximately 270 transactions for short term and about 100 transactions for long term. This constitutes business activities. Some of the transactions were carried out within a very short period. The Ld. DR further submitted that since every years' proceedings, under the I.T. Act is an independent proceedings, the facts which has been accepted by the department in earlier years can be re-examined to ascertain the real facts and intention of the assessee.

6.2. On the other hand, Id. AR for the assessee has submitted before us that assessee is a salaried employee and not a full time businessman. He invests his savings in shares, Mutual Funds, and Securities to earn dividend and interest income. The assessee always considers purchase of shares/Mutual Funds etc. as Investment in earlier as well as in subsequent years, and the Department also accepted the said stand and hence income arising from sale of shares/Mutual Funds etc. should be treated as LTCG/STCG, as investment income and not as business income. The assessee does not maintain any office and all the purchase

and sales orders were placed on telephone and didn't require any organized and systematic effort on his part for such purchase/sale. As and when he noticed that there were risks in any of the investments in shares/Mutual Funds, he chose to switch over to other investment avenues to maximize his return. Since the assessee was an employee and salary income was the major source of his earning in the earlier years, the purchase of shares and Mutual Funds etc. had all along been considered as his investment activities and as such the same had been shown as investment in the balance sheet of the respective years and never treated it as stock-in-trade. The Id AR for the assessee also relied on Circular No. 6/2016 dated 29-02-2016 wherein the CBDT has clarified the following:

"3.(a) Disputes, however, continue to exist in the application of these principles to the facts of an individual case since the taxpayers find it difficult to prove the intention in acquiring such shares/securities. In this background, while recognizing that no universal principal in absolute terms can be laid down to decide the character of income from sale of shares and securities (i.e. whether the same is in the nature of capital gain or business income), CBDT realizing that major part of shares/securities transactions takes place in respect of the listed ones and with a view to reduce litigation and uncertainty in the matter, in partial modification to the aforesaid circulars (i.e. Circular No. 412007 dtd. 15-06-2007 & Instruction No. 1827 dtd. 31-08-1989), further instructs that the Assessing Officers in holding whether the surplus generated from sale of listed shares or other securities would be treated as capital gain or business income, shall take into account the following:

a) Where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares /securities would be treated as its business income....

Since the assessee never treated his investments as stock-in trade therefore these are to be treated as "Investments" and not the business income.

6.3 Having heard the rival submissions, perused the material on record, we noticed that in the earlier years, the assessee had disclosed the gain/loss on sale of shares/Mutual Funds as STCG/LTCG or STCL/LTCL, as the case may be. The said treatment had been made in the return of income for the relevant assessment year also. Similar treatment is being made for subsequent years also. Further, since the assessee was not engaged in any business activities for purchase/sale of shares, Mutual Funds etc. and he had not shown the gain/loss on sale of shares/Mutual Funds etc, as business income in the return of income in any of the earlier or subsequent years. The Department had also accepted the said stand of the assessee in the scrutiny assessment order under section 143(3) of the Act for earlier as well as in subsequent years. Considering the factual position, we are of the view that the order passed by the Id. CIT(A) does not require any interference. Accordingly, we confirm the order passed by Id. CIT(A).

6.4 In the result, appeal filed by the Revenue on ground No.1, is dismissed.

7. Ground No.2 raised by the Revenue and cross objection No.1 raised by the Assessee relates to issue of disallowance u/s.14A r.w.rule 8D of the Act. Since, ground No.2 raised by the Revenue and cross objections No.1 raised by the Assessee are on the same identical issue and facts, therefore, these are being adjudicated together.

7.1. The Ld. DR for the Revenue has stated that assessee has claimed exempt income to the tune of Rs.20,06,800/-. In order to earn the said exempted income, the assessee would have incurred some expenditure which the assessee might have claimed in its profit and loss account. The expenditure incurred in relation to exempted income should not be allowed. In order to maintain such huge investment portfolio, the assessee necessarily have incurred some expenses which should be disallowed.

7.2. On the other hand, Id. AR for the assessee has submitted that the assessee is a salaried employee and he has not deducted any expenditure to the profit and loss account. In fact, the assessee has not prepared any profit and loss account and has not claimed any expenditure whatsoever. Therefore, there is no any question for disallowance under Section 14A read with rule 8D. In the case under consideration the assessee has not prepared the profit and loss account at all and he has not claimed any expenses in the profit and loss account, therefore, no any question arises to make disallowance u/s.14A r.w.rule 8D.

7.3. Having heard the rival submissions, perused the material on record, we are of the view that Section 14A r.w.rule 8D does not apply to the assessee under consideration. First of all, the assessee is a salaried employee and he did not prepare any profit and loss account and he did not claim any expenditure in the profit and loss account relating to the exempted income, therefore, there is no any question for disallowance.

Had the assessee claimed the expenditure in the profit and loss account then there would have been disallowance u/s.14A r.w.rule 8D. In this case, the assessee has not prepared any profit and loss account and not claimed any expenditure whatsoever, therefore, Section 14A read with rule 8D do not apply to the assessee under consideration. Therefore, considering the factual position, the addition made by the AO and confirmed by the Id. CIT(A) needs to be deleted. Accordingly, we delete the addition.

7.4 In the result, ground No.2 raised by the Revenue in ITA No.2315/Kol/2013 is dismissed and ground No.1 raised by the assessee in its cross objection No.28/Kol/2016, is allowed.

8. In the result, appeal of the Revenue, is dismissed and cross objection of the assessee, is allowed.

Order pronounced in the open court on this 28/04/2017.

Sd/-
(N.V.VASUDEVAN)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(DR. A.L.SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata; दिनांक Dated 28/04/2017

प्रकाश मिश्रा/Prakash Mishra,Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-DCIT, Cir-10, Kolkata.
2. प्रत्यर्थी / The Respondent.-M.R.Rajaram
3. आयकर आयुक्त(अपील) / The CIT(A), Kolkata.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY
ORDER,

सत्यापित प्रति //True Copy//

सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, कोलकाता / ITAT, Kolkata