

आयकर अपीलिय अधिकरण "एच" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI

श्री शैलेंद्र कुमार यादव, न्यायिक सदस्य एवं श्री रमित कोचर, लेखा सदस्य के समक्ष।
BEFORE SHRI SHAILENDRA KUMAR YADAV, JM
AND SHRI RAMIT KOCHAR, AM

आयकर अपील सं./ITA No. 1068/Mum/2012
(निर्धारण वर्ष/Assessment Year: 2008-09)

Shri Hiten Pravinchandra Dalal DCIT, Circle 14(2)
Plot No. 77ABC, Government बनाम/ 3rd Floor, Earnest House
Indl. Estate, Charkop Vs. Nariman Point, Mumbai 400020
Kandivali (W), Mumbai 400067

स्थायी लेखा सं./PAN - AABPD5221H

अपीलार्थी/APPELLANT

प्रत्यर्थी/ RESPONDENT

अपीलार्थी की ओर से / Appellant by: Shri Deepak Tralshawala
प्रत्यर्थी की ओर से/ Respondent by: Shri K. Mohandas

सुनवाई की तारीख /Date of Hearing : 15.10.2015
घोषणा की तारीख/Date of Pronouncement : 30.10.2015

आदेश / O R D E R

PER SHAILENDRA KUMAR YADAV, JM

This appeal has been filed by the assessee against the order dated 31.01.2012 passed by CIT(A)-25, Mumbai and it pertains to A.Y. 2008-09.

2. The following grounds were raised by the assessee: -

1. On the facts and in the circumstances of the case and in law, the Commissioner of Income Tax, Appeals - 25, Mumbai, hereinafter referred to as the Ld. CIT(A), has erred in law in assessing Capital Gains under the head Business Income. The said income pertains from the Investments of the Appellant and by law and on the facts of the case is to be treated as Capital Gains and not as business Income.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has without understanding the facts of the case have erred in assessing income under the head Income from House Property in respect of rented property at Rs.3,77,545/- instead of Loss from Other sources of Rs.428150. The Loss of the Appellant may please be accepted.”
3. Assessee is an individual and engaged in the business of export and of retail stores. Assessee has in respect of its own surplus funds utilized the services of Portfolio Management Services (PMS). The capital gain consists only of gains or losses of transaction for PMS only. The income derived from Portfolio Management Services Agencies was offered by the assessee under capital gain both short term capital gain and long term capital gain. After examining the submission of the assessee, the Assessing Officer was of the view that the assessee had invested huge fund with the Portfolio Management Services agencies with sole intention to remain invested in shares to make profit at the earliest opportunity depending upon the decisions of Portfolio Management Services agencies, who are nothing but act as an agent of the assessee to deal in shares/securities on his behalf. Having regard to the nature and quantity as well as frequency of transactions carried out by PMS agencies and in particular the fact that assessee has no control or say in activities carried out by the Portfolio Management Services agencies, Assessing Officer held that the profit earned/received from PMS agencies is business profit and cannot be termed as short term capital gain and long term capital gain as claimed by the assessee. Accordingly, the profit of ₹1,87,15,072/- realized from four PMS agencies was treated as profits and gains of business or profession. In appeal the same was confirmed by the CIT(A). Before us the learned A.R. for the assessee submitted that the CIT(A) erred in assessing the capital gains under the head business

income. He stated that the said income pertains to investment of assessee and on the facts of the case is to be treated as capital gains and not as business income. Capital gain consists only of gains or losses of transaction for Portfolio Management Services only. In the previous year for A.Y. 2007-07 the said matter has already been decided in the matter of assessee by concerned CIT(A) in favour of the assessee and the Department has accepted the order of the CIT(A) by not preferring an appeal against the same. Further in the scrutiny for A.Y. 2009-10 the concerned Addl. CIT has accepted the same as capital gain. Hence as per the principle of consistency the Assessing Officer should not divert from the consistent view adopted by him vis-à-vis the assessee on this issue. The learned A.R. for the assessee has drawn our attention to the decision of the Hon'ble Karnataka High Court in the case of CIT vs. M/s. Kapur Investments P Ltd. (ITA No. 158 of 2014 dated 20th April 2015) wherein on similar issue the court held as under: -

“10. As regards the first question that merely because of employment of Portfolio Management Service for investment in shares, the same would become business income, we are of the opinion that the said issue has been dealt with at length by the Delhi High Court in the case of **Radials International** (supra), wherein, in, similar facts, the question has been answered in favour of the assessee and against the Revenue. Detailed reasons for the same have been given in the said judgment with which we concur. Even otherwise, it is admittedly not a case where the assessee had engaged its own persons or had a separate business infrastructure to carry out its share transactions for the purpose of business. It is merely a case where the assessee has invested funds through the Portfolio Management Service.

11. In our opinion, investment through Portfolio management Service, which may deal with the shares of the assessee so as to

derive maximum profits cannot be termed as business of the assessee but would only be a case of a more careful and prudent mode of investment, which has been done by the assessee. Funds which lie with the assessee can always be invested (for earning higher returns) in the shares either directly or through professionally managed Portfolio Management Scheme and by doing so, it would not mean that the assessee is carrying on the business of investment in shares. Profits from such investment, either directly or through professionally managed firm, would still remain as profits to be taxed as capital gains as the same will not change the nature of investment, which is in shares, and the law permits it to be taxed as capital gains and not as business income.

12. As regards the second question of the assessee having taken loan and having invested borrowed funds in purchase of shares, we are of the view that the Income Tax Act does not prohibit the assessee from making investments in capital assets after using borrowed funds. The Tribunal has also considered this aspect of the matter and decided in favour of the assessee and we see no reason to differ with such opinion of the Tribunal.

13. We have also gone through the Circular of the CBDT dated 15.06.2007 and are of the opinion that the findings arrived at by the Tribunal are in conformity with the guidelines issued by the said Circular.

14. In view of the aforesaid, we are of the opinion that no substantial question of law arises for determination of this Court."

In this background it was submitted that the order of the CIT(A) be set aside and the Assessing Officer is to be directed to assess the gain in question under the head capital gain instead of business income. On the other hand, the learned D.R. supported the order of the CIT(A).

3.2 After going through the rival submissions and material on record we find that the assessee has made investment under PMS. Profit arising from securities purchased or such deposits, which were traded by the concerned portfolio manager as his PMS. Similar issue arose

before the Hon'ble Karnataka High Court in the case of M/s. Kapur Investments P Ltd. (supra) wherein the assessee was engaged in the business of finance and films. It made investments in shares through PMS. The Hon'ble Karnataka High Court, following the ratio laid down by the Hon'ble Delhi High Court, in the case of Radicals International vs. CIT reported in (2014) 367 ITR 1 and Circular No. 4/2007 dated 16.06.2007 issued by CBDT held that investment made by assessee in shares in such situation would be termed as income from capital gain. Admittedly, assessee has invested funds through portfolio management services which may deal with shares of assessee so as to derive maximum profits cannot be termed as business of the assessee but would only be a case of a more careful and prudent mode of investment, which has been done by the assessee. Funds which lie with the assessee can always be invested (for earning higher returns) in the shares either directly or through professionally managed Portfolio Management Scheme and by doing so, it would not mean that the assessee is carrying on the business of investment in shares. Profit from such investment, either directly or through professionally managed firm, would still remain as profits to be taxed as capital gains as the same will not change the nature of investment, which is in the shares, and the law permits it to be taxed as capital gains and not as business income. Regarding the second link of the argument of the Assessing Officer that the assessee having taken loan and having invested borrowed funds in purchase of shares, we are of the view that the Income Tax Act does not prohibit the assessee from making investments in capital assets after using borrowed funds. Our view is supported by the circular No. 4/2007 of CBDT dated 15.07.2007. In view of this the Assessing Officer is directed to treat the gain as capital gains and not as business income.

4. Second issue is with regard to treatment of income from house property in respect of rented property. During the course of assessment proceedings the Assessing Officer found that assessee has shown rental income from Priyadarshini property amounting to ₹5,39,350/- against which assessee had claimed repairs and collection charges of ₹9,67,500/- and claimed loss of ₹4,28,150/- This loss was set off against salary income earned during the year. According to Assessing Officer, as per provision of section 24(a) assessee was entitled for deduction @30% on annual letting value. Since the claim of the assessee was excessive, Assessing Officer allowed deduction under section 24(a) @30% which amounts to ₹1,61,805/-. In result, income from house property was computed at ₹3,77,545/-. The matter was carried before the first Appellate Authority. The CIT(A) was of the opinion that only statutory deduction @30% is allowable (alongwith interest expenses), which covers all type of expenses. The CIT(A) directed the Assessing Officer to verify the return of preceding years as well as succeeding years and ensure that excessive deduction is not claimed by assessee. If the assessee had claimed excessive deduction apart from section 24(a), Assessing Officer should take necessary remedial action with a view to safeguard the interest of Revenue.

4.1 The stand of the assessee before us is that the Assessing Officer erred in assigning income under the head 'income from house property' in respect of rented property at ₹3,77,545/- instead of loss from other source of ₹4,28,150/-, therefore the Assessing Officer should be directed accordingly. On the other hand, the learned D.R. supported the order of the Authorities below.

4.2 After going through the rival submissions and the material on record we find that assessee claimed to have taken property at Priyadarshini as stated above to be let out but he incurred loss. Assessee is entitled for statutory deduction @30%. In view of this, orders of authorities below need no interference from our side on this issue. We uphold the same.

5. In the result, appeal filed by the assessee is partly allowed as indicated above.

परिणामतः निर्धारिती की अपील आंशिक स्वीकृत की जाती है।

Order pronounced in the open court on 30th October, 2015.
आदेश की घोषणा खुले न्यायालय में दिनांक: 30.10.2015 को की गई।

Sd/- (RAMIT KOCHAR) लेखा सदस्य/ACCOUNTANT MEMBER	Sd/- (SHAIENDRA KUMAR YADAV) न्यायिक सदस्य/JUDICIAL MEMBER
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मुंबई Mumbai, दिनांक Dated 30th October, 2015

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A) - 25, Mumbai
4. आयकर आयुक्त / The CIT - IX, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, "H" Bench ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ By Order

सत्यापित प्रति //True Copy//

सहायक पंजीकार /Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई/ITAT, Mumbai