

IN THE INCOME TAX APPELLATE TRIBUNAL
“D” Bench, Mumbai
Before Shri B.R. Baskaran (AM) & Shri Ravish Sood(JM)

I.T.A. No. 2375/Mum/2014
(Assessment Year 2008-09)

Reliance Capital Partners Kamala Mills Compound Trade World, B-Wing 7 th Floor, S.B. Marg Lower Pael Mumbai-400 013.	Vs.	ITO Ward 19(2)(2) Room No. 309 3 rd Floor Piramal Chambers Lalbaugh, Parel Mumbai-400 012.
(Appellant)		(Respondent)

I.T.A. No. 2083/Mum/2014
(Assessment Year 2008-09)

ACIT-19(2) Room No. 315 3 rd Floor Piramal Chambers Lalbaugh, Parel Mumbai-400 012.	Vs.	M/s. Reliance Capital Partners Kamala Mills Compound Trade World, B-Wing 7 th Floor, S.B. Marg Lower Pael Mumbai-400 013.
(Appellant)		(Respondent)

PAN No. AAIFR9553P

Assessee by	Shri Jitendra Sanghvi
Department by	Shri B. Prusheth
Date of Hearing	4.1.2017
Date of Pronouncement	28.2.2017

O R D E R

Per B.R. Baskaran (AM) :-

These cross appeals are directed against the order dated 8.1.2014 passed by the learned CIT(A)-30, Mumbai and they relate to A.Y.2008-09.

2. The assessee is aggrieved by the decision of the learned CIT(A) in upholding the validity of reopening of assessment. The Revenue is challenging the decision of the learned CIT(A) in holding that profit on sale of shares

amounting to ₹ 26.87 crores should be assessed as long term capital gains exempt u/s. 10(38) of the Act.

3. Facts relating to the case are stated in brief. The assessee herein is a partnership firm formed on 19.4.2006 with three partners namely M/s. Reliance Capital Ltd., M/s. Reliance Land Pvt. Ltd. and M/s. Sonata Investment Limited. Subsequently, by a deed dated 21.4.2006, M/s. Sonata Investment Ltd. retired from the partnership firm and Mr. Surendra Pipara was inducted as a partner. The object of the partnership firm shall be that of trading in various commodities and articles other than shares, securities, life insurance and/or such other business or businesses as the parties mutually agreed upon. As per clause 6 of the partnership deed, profit and loss shall be divided in the ratio of weighted average capital of the partners.

4. According to the assessee, the return of income filed for A.Y. 2007-08 has been accepted by the Assessing Officer treating the status of the assessee as partnership firm. Return of income for the year under consideration was filed on 30.7.2008 wherein the assessee declared long term capital gain arising on sale of shares of M/s. Assam Company Ltd. amounting to ₹ 26.87 crores. These shares were purchased immediately preceding year and were duly declared as “investment” in the books of account.

5. Subsequently, the Assessing Officer reopened the assessment by issuing notice u/s. 148 on 16.5.2012 i.e. within the four years from the end of the assessment year. Reasons given for reopening were that the Assessing Officer had taken the view that profit sharing ratio stood at 100%, 0% & 0% in A.Y. 2007-08 between three partners and hence M/s. Reliance Capital Ltd. should be considered as sole proprietor of the business. Since the profit sharing ratio for the year under consideration stood at 99.98%, 0.1% and 0.1%, the partnership firm should be recognized for AY 2008-09 only, i.e., from 1.4.2007 onwards, in which case, the purchase date of shares of M/s Assam Company Ltd by the partnership firm should be taken as 1.4.2007 and hence profit

arising on sale of shares of M/s. Assam Company Ltd. cannot be considered as long term capital gains since the period of holding of shares by partnership firm shall work out to less than one year. The Assessing Officer also expressed the view that the detailed examination of the case is required for the purpose of concluding whether profit on sale of shares is 'business income' or 'short term capital gains'. With these reasoning, the Assessing Officer reopened the assessment.

6. In the reopened assessment, the Assessing Officer took the view that M/s. Reliance Capital Ltd. has formed this partnership firm in order to generate long term capital gain, since profit arising on sale of shares would have been taxed as business income in the hands of M/s. Reliance Capital Ltd. It may be noted that M/s Reliance capital Ltd was the major partner in the assessee firm and shared 100% of profits. The Assessing Officer also took the view that the assessee held of 10.12% of M/s. Assam Company Ltd. and hence the assessee was single largest shareholder amongst the "public shareholders" category. Since, M/s. Assam Company Ltd., is a major player in Tea market and hence assessee has purchased shares of the above said company in order to further its business interest since trading in commodities is one of the objectives of the firm. With regard to the claim of the assessee that it had held the shares as its Investment, the Assessing Officer observed that the treatment given in the books of account cannot be considered as sole deciding factor and in this regard he placed reliance on the decision rendered by Hon'ble Supreme Court in the case of Chowringhee Sales Bureau (87 ITR 548). He also took the view that conduct of the assessee, objective, acquisition of shares has to be considered in order to decide about the nature of transactions. Accordingly the Assessing Officer took the view that the profit arising on sale of shares of M/s. Assam Company Ltd. should be assessed as business income and completed assessment accordingly.

7. Before Ld CIT(A), the assessee contested the validity of reopening of assessment as well as the assessment of profits arising on sale of shares as its

business income. The Ld CIT(A) upheld the validity of reopening, but agreed with the assessee's contention that the profits arising on sale of shares of M/s Assam company Ltd should be assessed as Long term capital gains only. Both the parties are aggrieved on the points decided against each of them.

8. We shall first take up the appeal filed by the revenue, wherein the revenue is contesting the decision of Ld CIT(A) in holding that the gain arising on sale of shares of M/s Assam Company Ltd should be assessed as Long term capital gain. The Ld CIT(A) has decided this issue in favour of the assessee by observing as under:-

6.1 I have duly considered the discussion made in the assessment order and submissions of the appellant. The reasons recorded by the AO for reopening of the assessment has been that the appellant firm during the asst. year 2007-08, i.e. in the preceding asst. year was formed by three partners, viz. (i) Reliance Capital Ltd. , (ii) Reliance Land Pvt. Ltd. & (iii) Shri Surendra Pipara in the profit sharing ratio of 100%, 0%, 0% and, since M/s. Reliance Capital Ltd. held 100% of profit sharing ratio, as per the provisions of partnership deed, it could not be considered as a partnership firm, but a proprietary concern of M/s. Reliance Capital gains and during the year the profit sharing ratio, amongst the three partners though is 99.98%, 0.01% and 0.01%, the same has been arranged in such a way that the primary condition of being a partnership firm, as stipulated in the partnership deed and Income tax Act, is fulfilled.

6.2 In the above background of the profit sharing ratio of the partners in the asst. year 2007-08 and year under consideration, i.e. 2008-09, the Assessing Officer also found that since the partnership firm was not in existence during the period relevant to asst. year 2007-08, the capital gain arising out of sale of shares of Assam Co. Ltd. purchased on 19.05.06 for a cost of Rs.30.84 crore and sold on 08.01.08 for a consideration amount of Rs.57.72 crore cannot be considered as Long Term Capital Gain. In other words, the Assessing Officer is of the view that the partnership was valid under the Partnership Act during the year under consideration only and, therefore, the shares of M/s. Assam Co. Ltd. have been held for less than one year, hence, exemption u/ s. 10(38) of the Act is not available to the appellant. The discussion made in the assessment order and the conclusions drawn by Assessing Officer were around the above three propositions.

6.2 The facts, relating to the constitution of the appellant firm are that it was formed w.e.f. 19.04.06. Subsequently, on 21.04.06, there

was a change in the partnership deed, whereby one of the partners viz. M/s. Sonata Investments Ltd. retired and its place was taken by Shri Surendra Pipara. The other two partners, i.e. M/s. Reliance Capital Ltd. and Reliance Land Capital Ltd. continued in the partnership firm. The profit sharing ratio amongst the partners remained the same in asst. years 2007-08 & 2008-09 i.e. 100% profit has gone to one partner only i.e. Mts. Reliance Capital Ltd. The remaining two partners have not been given any share in the profit. The capital in the firm has been introduced by Reliance Capital Ltd. and other partners have not contributed to the capital.

6.3 The first two propositions made by the AO that constitution of the partnership firm is not fair, as entire profit has been shared by only one partner and, in the preceding asst. year i.e. 2007-08, there was no partnership in existence, because the other two partners had no share in the holding of the partnership firm hence, the holding period of the shares during the year is less than 12 months, has been countered by the appellant by stating that its return of income for A.Y. 2007-08 has been accepted and therefore, the existence of the partnership as well as the holding period of shares being more than one year, cannot be doubted.

6.4 The basic issue, therefore, which will determine the character or the partnership firm as well as nature of transaction of sale of shares carried out during the year, directly relate to the assessment made in asst. year 2007-08, which is the first year of the filing of return of income, and assessment. A copy of the assessment order dated 11.09.09 u/s. 143(3) of the Act has been filed by the appellant, wherein the nature of business of the appellant has been mentioned as 'Trading in Commodities and Articles other than shares, securities and like investments. The appellant had filed 'Nil' return of income for Asst. Year 2007-08 and the assessment was completed at the said income declared by the appellant. It is, therefore, apparent from the above assessment order that the constitution of the partnership, as per the partnership deed dtd. 19.04.06 and deed of retirement and introduction dtd.21.04.06, was accepted by the AO. Similarly, profit sharing ratio as per the Deed has also been accepted. Further, the nature of business carried on by the appellant, that has been accepted by the AO, is of trading in commodities and articles other than share securities and like investments. In other words, declaration of the shares of M/s. Assam Co. Ltd. purchased by the appellant on 19.05.06, under the head 'Investments' has also been accepted in the above year. Since the AO has not disturbed the position of above facts in asst. year 2007-08, the position remains the same as at the beginning of the financial year relating to asst. year under consideration.

6.5 The AO has also examined the transaction of sale of shares of Assam Co. Ltd. by examining the ownership pattern of the appellant firm, shareholding pattern of M/s. Assam Co. Ltd., nature of business of the appellant, treatment of the transaction of shares in the books of account of the appellant, and applicability of the decision in the case of M/s. McDowell Ltd.(supra). The argument taken by the appellant in support of its case is that it made purchase of shares of two companies in asst. year 2007-08, viz. M/s. Assam Co. Ltd. and M/s. Maxwell Industries Ltd. and during the year it has sold shares of M/s. Assam Co. Ltd. and retained the shares of other company. It is further contended that the shares were purchased through stock broker, M/s. Reliance Share 86 Brokers Pvt. Ltd. and also, it is not part of the group of promoters of the said company and, because, it has held more than 1% of the equity capital of Assam Co. Ltd., it's name is appearing in the list of 'public holding', of the above company. The other contention of the appellant is that it has not attended any general meeting of the company. The appellant's further submission is that 10.06% of shareholding in Assam Co. Ltd. could not have given it control in the company, which could have enabled it to participate in the business or carry on the business of the company. It has, therefore, been stated that there was never any intention to trade and increase the profit of the above company. It has also been argued that the shares of M/s. Assam Co. Ltd. have been held for more than 15 months and, from the time the appellant firm has been formed, sale of equity shares of Assam Co. Ltd., was the solitary transaction, as such, gain arising therefrom was declared under the head 'capital gains'.

6.6 Another contention of the appellant is that the profit on sale of shares has always been treated as 'capital gains' in the hands of Reliance Capital Ltd. and there was no question of tax avoidance, and, in so far as the AO's observation that the appellant was single largest share-holder and over-all largest shareholder in M/s. Assam Co. Ltd. was concerned, M/s. Assam Co. Ltd. is very closely held company and only four persons are having shares from promoters' quota and it was dealing in production of commodities as trading in commodity is one of the areas of operations, and, the firm had no right of management as they were not part of the promoters group, neither any particular partner of the appellant firm was nominated on the Board of Directors of Assam Co. Ltd.

7. On due consideration of the above facts, I am of the considered view that since 01.04.07, the shares of M/s. Assam Co. Ltd. were held as investment, the same has, therefore, to be examined accordingly. The facts further show that the entire shares held as investments were partially sold vide broker's note da-1.19.05.06 & 29.08.06. The AO has also not found any repetitive transaction of sale and purchase of shares of M/s. Assam Co. Ltd. during the year. On the contrary,

there has been no purchase of shares during the year and there has been sale of shares of Assam Co. Ltd. only. Therefore, the above facts do not lead to any conclusion that the appellant has been trading in shares of Assam Co. Ltd. In so far as the other finding given by the AO that the appellant had acquired the shares of Assam Co. Ltd. so as to be a part of the business of said company and share profits, being the largest public shareholder of the said company, is concerned, from the details filed during the course of assessment proceedings, and the discussion made in the assessment order, I do not find any proof or evidence leading to such conclusion.

7.1 In view of the discussion made above, I hold that the period 12 months, the profit of Rs.26,87 crore on sale of shares of M/s. Assam Co. Ltd. has been correctly offered under the head 'Long Term Capital Gain', Consequently, the appellant is liable for exemption u/s. 10(38) of the Act. I, accordingly direct the AO to treat the above amount of Rs.26.87 crore as 'Long Term Capital Gain' and allow exemption u/ s. 10(38) of the Act."

9. We have noticed that the Ld CIT(A) has given a finding that the assessee firm has been formed as a Partnership firm by fulfilling the requirements of the provisions of the Act. The Ld CIT(A) has noticed that the assessment of the AY 2007-08 has been completed on 11.09.2009 u/s 143(3) of the Act by accepting the status of the assessee as Partnership firm. Hence the AO was not justified in taking altogether a different view by observing that the status of the assessee cannot be considered to be a Partnership firm in AY 2007-08. We also notice that the Partnership deed provides that the profit or loss of the firm shall be divided in the ratio of average working capital brought in by the partners. In both the years, the major partner M/s Reliance Capital Ltd has brought in entire funds and hence as per the profit/loss sharing ratio provided for in Partnership deed, the entire profit was allocated to the above said partner. We notice that the AO has not examined the provisions of Partnership Deed before coming to the conclusion that the status of the assessee cannot be taken as partnership firm in AY 2007-08. Hence the view taken by the AO is against the Partnership Deed as well as the assessment record relating to AY 2007-08. In any case, the AO has not disturbed the assessment relating to AY 2007-08, i.e., the status of the assessee has been accepted as Partnership

firm in AY 2007-08. In that case, it would not be proper for the AO to take the view that the holding period of the shares of M/s Assam Company Ltd can be recognized from 1.4.2007 only.

10. The AO has taken the view that M/s Reliance Capital Ltd has formed this assessee firm only to generate long term capital gains and he has further observed that the same income would have been assessed as business profits, had it purchased the shares of M/s Assam Company Ltd on its account. The Ld A.R furnished copies of Profit and Loss account as well as the assessment order of M/s Reliance capital Ltd to show that M/s Reliance capital Ltd has declared Short term capital gains and also Long term capital gains in purchase and sale of shares, meaning thereby, the presumption entertained by the AO has been proved to be wrong. Accordingly the Ld A.R submitted that there was no restriction for M/s Reliance Capital Ltd to hold the shares as its Investment.

11. Regarding the observation made by the AO that the assessee was the major share holder in "Public shareholding" category and further the assessee has invested in shares of M/s Assam company Ltd, the assessee has submitted that it did not get any controlling interest in the above said company and further the shares have actually been sold within 15 months. Hence, in our view, the above said factual position cannot change the character of the shares. On the contrary, in our view, it may support the case of the assessee that it had actually made investment in the shares of M/s Assam Company Ltd.

12. In view of the foregoing discussions, we are of the view that the Ld CIT(A) has taken judicious view of the matter and accordingly we uphold the order passed by Ld CIT(A) on this issue.

13. Since the view taken by Ld CIT(A) on merits has been upheld, we are of the view that the issue contested by the assessee relating to validity of reopening of assessment does not require adjudication, as the same would

result in an academic exercise.

14. In the result, the appeal of the revenue as well as the assessee is dismissed.

Order has been pronounced in the Court on 28.2.2017.

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 28/2/2017

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

PS

BY ORDER,
(Dy./Asstt. Registrar)
ITAT, Mumbai