

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "G", MUMBAI**

**BEFORE SHRI AMIT SHUKLA (JUDICIAL MEMBER)  
AND  
SHRI ASHWANI TANEJA (ACOUNTANT MEMBER)**

I.T.A. No.ITA No.3844/Mum/2013  
(Assessment year : 2005-06)

Gibs Computers Ltd Radha Bhavan, 1 <sup>st</sup> Floor 121, Nagindas Master Road Mumbai-23	vs	ACIT, Cent.Cir.40, Mumbai
PAN : AABCG0096L		
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by	Shri Neelkanth Khandelwal
Respondent by	Shri Ravi Kiran

Date of hearing : 23-05-2016  
Date of pronouncement : 23 -05-2016

**ORDER**

**Per ASHWANI TANEJA**

This appeal has been filed against the order of Id.CIT(A) dated 19-03-2013 passed against the assessment order u/s 144 r.w.s. 147 of the Act dt 14-10-2010 for A.Y. 2005-06 on the following grounds:

*"1. The Commissioner of Income-tax (Appeals) - 36, Mumbai (hereinafter referred to as the CIT(A)) erred in upholding the action of the Assistant Commissioner of Income-tax, Central Circle - 40, Mumbai (herein referred as the Assessing Officer) in reopening the assessment.*

*The appellants contend that on the facts and circumstances of the case and in law, the issue of notice under section 148 is bad in law and the reasons recorded under section 148 are vague, insufficient and erroneous in law and hence, the impugned assessment ought to have been quashed by the CIT(A).*

*2. The CIT(A) erred in upholding the action of the Assessing Officer in framing an ex-parte order.*

*The appellants contend that on the facts and circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in framing an ex-parte order.*

*3. The CIT(A) erred in upholding the action of the Assessing Officer in considering short-term capital gains Rs 56,61,041 as business income.*

*The appellants contend that on the facts and circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in considering the short-term capital gains as business income and hence, the action of the CIT(A) needs to be reversed.”*

2. During the course of hearing, it was brought out by the Id.counsel of the assessee that addition made in the assessment order is blatantly incorrect as per law and facts. It was submitted that there was no basis with the Assessing Officer to treat the impugned amount of gain earned on the transfer of shares as business income (speculation) merely on the ground that payment of securities transaction tax could not be established, which, according to the Assessing Officer, was prime criteria for applicability of section 111A of the Act. It was submitted that in case, security transaction tax was not paid, then, at the best, the assessee was not entitled for concessional rate of tax. But that fact itself will not make the impugned

amount of capital gain as business income, that too, speculative in nature. It was submitted that the assessee had submitted contract notes in the other case of the group company which was being assessed by the same Assessing Officer. It was further submitted that if an opportunity was given the assessee is willing to produce some more contract notes to the Assessing Officer once again to demonstrate that there was exchange of delivery of shares in this case, and therefore, the main transaction was not speculative at all.

3. On the other hand, the Id.DR fairly agreed that this case could be sent back for proper verification by the Assessing Officer.

4. We have gone through the facts of this case. With the assistance of the parties, we have examined the contract notes submitted before the Assessing Officer in the case of M/s Netscape Software Pvt Ltd, claimed to be group company of the assessee which was assessed by the same Assessing Officer. A perusal of the contract note shows that the impugned shares were mortgaged with Madhavpura Mercantile Co-operative Bank Ltd and these were sold to M/s JM Morgan Stanley Retail Services Pvt Ltd. The shares were kept by the said company and were handed over to the said party. There was clearly an exchange of delivery on behalf of the assessee. Under these circumstances, we find that the said transaction is neither speculative nor it becomes business income merely on the ground that payment of security transaction tax was not paid on the impugned transaction. Similar transactions have been accepted by the Assessing Officer as "Income from capital gains" all along. There was no basis to make different treatment for the impugned transaction. Under these circumstances, the impugned

transaction is held to be "Income from capital gain" and non speculative in nature. However, to meet the ends of justice, we sent this issue back to the file of the Assessing Officer for the limited purpose of verification of the contract notes as has been shown to us by the Id.counsel of the assessee. The Assessing Officer shall objectively take into account the documentary evidence as may be submitted by the assessee before the Assessing Officer and shall decide the issue afresh in the light of guidelines given by us above. Thus, grounds 2 & 3 may be treated as allowed, for statistical purpose.

5. In view of the above, ground 1 which deals with reopening of the assessment becomes academic in nature and, therefore, the same is dismissed as such.

*Order pronounced in the open court on 23<sup>rd</sup> May, 2016.*

Sd/-	sd/-
(AMIT SHUKLA)	(ASHWANI TANEJA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt :23<sup>rd</sup> My, 2016

Pk/-

Copy to :

1. The appellant
2. The respondent
3. The CIT(A)
4. The CIT
5. The Ld. Departmental Representative for the Revenue, "G" Bench

(True copy)

By order

ASSTT.REGISTRAR, ITAT, MUMBAI BENCHES