

आयकर अपीलीय अधिकरण, मुंबई " ई " खंडपीठ

Income-tax Appellate Tribunal -"E" Bench Mumbai

सर्वश्री राजेन्द्र, लेखा सदस्य एवं सी. एन. प्रसाद, न्यायिक सदस्य

Before S/Shri Rajendra, Accountant Member and C.N. Prasad, Judicial Member

आयकर अपील सं/ ITA No.5254/Mum/2011 : निर्धारण वर्ष/Assessment Year-2008-09

ACIT-25(2), Bandra (E), Mumbai.	Vs.	Sheela D. Shah, B-106, Nirmal Sagar, Devidas Lane, Off. S.V. Road, Borivali (W), Mumbai – 400 103 PAN : AKMPS 8855 M
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(Appellant)

(Respondent)

Revenue by: Shri R.K. Sahu – DR

Assessee by: Shri Sanjay R. Parikh - CA

सुनवाई की तारीख / Date of Hearing: 27/07/2016

घोषणा की तारीख / Date of Pronouncement: 26/10/2016

आयकर अधिनियम, 1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य, राजेन्द्र के अनुसार/ PER Rajendra A.M.-

Challenging the order, dated 28/04/2011 of the CIT (A)-35, Mumbai the Assessing Officer (AO) has filed the present appeal. Assessee, an individual, filed her return of income on 31/07/2008, declaring total income of Rs. 24.60 lakhs. The AO completed the assessment, under section 143 (3) of the Act, on 20/12/2010, determining her income at Rs. 1.96 Crores.

2. Effective ground of appeal is about restricting the disallowance made by the AO on account of the diverting the income arising out of Future & Options (F&O) profit. During the assessment proceedings, the AO found that the assessee was engaged in the business of dealing in F&O transactions, that she had shown income under the said had at Rs. 25.14 lakhs, that she had diverted -ed 80% of the profit of the business to Deepak Shah (DS) and 1% of the profit to each of the three other entities, that the profit was transferred before paying the tax. He directed the assessee to file explanation in that regard. The assessee submitted that the profit was shared as per the Memorandum of Understanding (MOU) entered into by the assessee with other entities. After considering the available material, the AO issued a show cause notice to the assessee, the AO held that in the reply to the show cause notice it was claimed that assessee was a housewife having not much knowledge/ experience in the stock market, that in the MoU it was mentioned that she had foreknowledge of securities markets and derivative trading, that she had contradicted -ed her own stand, that the assessee had claimed that all the transactions were made by her husband using his own expertise and margin money, that in the MoU it was stated that she had to maintain sufficient margin

money for doing transaction, that loan transactions entered into with her husband prove that the assessee had used her own funds for the F&O transactions, that she had not used the funds owned by her husband, that the persons to whom she had diverted profits before paying taxes were having their individual demet accounts and that they were indulged in the share trading activities, that the entire arrangement made by the assessee was nothing but a colourable device to transfer the book profit to other persons to reduce profit and to evade taxes on such profit, that she had taken loan from different persons, she had not used the funds received by her as loan from her husband, that the provisions of the act did not allow any person to transfer/divert any income before payment of tax by any manner to any other person, that the assessee's husband had a loss from F&O, that the assessee had profit from such transactions, that both of them entered into a colourable device to transfer the profit to the husband so as to set off the losses, that the date of entering into MoU also indicated the intention of the party's is that SEBI had asked all the share brokers and dealers to entered into an agreement with the client and register the same with SEBI before entering into a single transaction, that no proof of registration of the MoU was provided, that she had not explained as to why the income had been diverted to other entities, that the MoU did not specify anything about such transactions. Finally he held that income arising out of F&O transactions, amounting to Rs. 2.04 Crores was to be taxed in the hands of the assessee. As the assessee herself had offered Rs. 34.41 lakhs, so, the AO added the difference of Rs. 1.70 Crores to her total income.

**3.** Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him, it was argued that the assessee had entered into MoU, dated 01/04/2006 with DS, that according to understanding she paid 50% of the gross income from F&O segment to DS, that such an arrangement continued with effect from 01/04/2007 with changes, that one of the senses was that DS was to be paid 80% of the gross income instead of 50%, that the revised terms were incorporated by exhibiting MoU on 30/11/2007, that the MoU was effective from 01/04/2007, that she unmeasured profit in the month of January 2008, that the question of MoU being a colourable device to divert the taxable income of the assessee in favour of husband was factually incorrect, that the second MoU was nothing but a continuity/extension of the earlier MoU to incorporate the revised returns, that there was no diversion of income, that there was some difference in the earlier and subsequent MoU, that in the first MoU the assessee was the first party, that DS was the first signatory in the second MoU, that necessary changes were made in the second document, that the AO had confused the MoU, that sharing of expenses of the business was a

matter to be agreed between two parties and such an agreement could not be regarded as sham just because the expenses were agreed to be shared by one of the parties of the contract, that the MoU was in existence for three years and not only for the year under consideration, that the assessee and her husband were assessed at maximum rate of taxation, that there was no diversion of income, that same income had been taxed twice, that DS had knowledge and experience in the stock market, that she would operate the terminal provided by the broker, that the letter from the broker was also submitted during the course of assessment proceedings, that the AO ignored the said letter, that DS had made arrangement for funds whenever required by the assessee, that she had obtained overdraft facility from Citibank to the tune of Ruby 60 lakhs against the FD.s owned by DS, that the assessee and her husband were assessed by different AO.s, that the AO of DS had accepted the income offered by him while passing assessment order under section 143 (3) of the Act, that the assessment of the husband of the assessee was not on protective basis.

After considering the submission of the assessee and the assessment order, the FAA held that in the earlier year the assessee and her husband had shown the income arising from F&O segments in their respective returns of income, that she had also limited funds to the other parties of the image you, that she had also recovered from DS funds when the losses had been incurred, that the copy of Ledger account and bank statement of DS clearly proved that assessee had recovered the due money from her husband, that there was difference in the MoU as far as first signatory is concerned, that major funding of the transactions was done by DS indirectly by allowing his fixed deposits with Citibank as security against the loan taken by the assessee, that Ohm Stock -broker Private Ltd had provided one dedicated terminal to DS, that the assessee had submitted a letter to the AO, that both the parties were paying tax at maximum rate of taxation, that the contention of the AO that there was diversion of income to save tax had no force, that there was very less expenses claim against the total income by the assessee, that arm of hearing expenses could not be held against the assessee for drying any conclusion, that assessee had earned major profit from F&Os activities in the month of January, 2008 and March, 2008, that DS suffered loss in the month of March 2008, that the allegation that profit was diverted to Deepak Shah to cover the losses was incorrect, that the assessee and her husband had traded in different scripts, that MoU was not a colourable device. He further held that the assessee and her husband share profit/loss from F&O activities in the ratio of 50: 50 during the earlier assessment year, that the assessee failed to substantiate with any reason for increase in the profit ratio of DS from 50% to 80% and also share profit given to other parties, that no convincing reason was submitted to increase the share of profit.

Invoking the provisions of section 40 A (2) (a) of the Act, he held that 50% of profit to DS was reasonable. He upheld the disallowance of payment of share profit made to 3 other parties. He also held that the disallowance made by the AO resulted in double taxation of the same income -once in the hands of the assessee and again in the hands of her husband, that the return filed by her husband proved that payments made by her to DS were already offered and assessed in the hands of her husband during the scrutiny assessment, that DS suffered a loss of 58.86 lakhs, that if that disallowance was restricted to 50% there would be no loss of revenue. Finally, he directed the AO to rest the disallowance to Rs. 67.52 lakhs.

4. Before us, the Departmental Representative (DR) supported the order of the AO and argued that DS was having a separate bank account in his own name, that the intention of evading tax was clear from the MoU entered into, that there was benefit in slabs of tax-rates, that the main purpose was to set off losses, that application of income could not be claimed as revenue expenditure. He relied upon the case of Sumati Dayal (214 ITR 810) and Durga Prasad More.

The Authorised Representative (AR) contended that the assessee had a similar agreement with DS for the earlier year and had paid 50% of the profit, that the department had accepted the profit sharing ratio in the hands of the assessee and husband in that year, that the AO of her husband had accepted the profit shown by DS on a substantive basis, that F&O income of Rs. 1.63 Crores had been taxed in the hands of DS, that taxing the same once again in the hands of the assessee would amount to double taxation. He relied upon the cases of Laxmi Prasad Singhania (72 ITR 291) and Smt. J P Sidhwa (131 ITR 840).

5. We have heard the rival submissions and perused the material before us. We find that the assessee had entered into MoUs with her husband in the earlier year, that the MoU was revised in the year under consideration and the profit sharing ratio was also altered, that she had entered into F&O transactions during the month of January and March which resulted in profit, that as per the terms of the MoU she transferred 80% of the profit to her husband, that her husband suffered losses in the F&O segment in the month of March, that both had paid taxes at the maximum marginal rate i.e. @30%, that she had used FD of her husband to avail the loan for carrying out F&O segment business, that the AO had treated the transaction as a colourable device to evade the payment of tax, that the FAA had partially allowed the appeal filed by the assessee. We find that the AO had not doubted the genuineness of the MoU. He has not alleged that it was backdated or was not entered into. His only objection is that DS had suffered losses and profit transferred by the assessee to her husband was set off against the

losses suffered by him. In our opinion, once the MoU was not found to be non-genuine it could not be held that it was a colourable device. Had the husband of the assessee not suffered losses would the AO treat the MoUs non-genuine. Execution of the MoU before the transactions entered into by the husband and wife is not in doubt. It is also a fact the DS offered the income received from the assessee in his return of income and has paid taxes on it. We further find that the FAA made the disallowance of 30% of the profit transferred by the assessee to her husband. Considering the peculiar facts and circumstances of the case, we are of the opinion that the order of the F AA does not suffer from any legal or factual infirmity. Therefore, upholding his order, we decide the effective ground of appeal against the AO.

As a result, appeal filed by the AO stands dismissed.

फलतःनिर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है

Order pronounced in the open court on 26<sup>th</sup>, October, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक , 2016 को की गई।

Sd/-

Sd/-

(सी. एन. प्रसाद / C.N. Prasad)

(राजेन्द्र / Rajendra)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 26/10/2016.

Vr/-

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

1. Appellant /अपीलार्थी
2. Respondent /प्रत्यर्थी
3. The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त,
4. The concerned CIT /संबद्ध आयकर आयुक्त
5. DR "E" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ, आ.अ.न्याया.मुंबई
6. Guard File/गार्ड फाईल.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.