

IN THE INCOME TAX APPELLATE TRIBUNAL
“E” Bench, Mumbai
Before Shri B.R. Baskaran (AM)& Ramlal Negi (JM)

I.T.A. No. 20/Mum/2015
(Assessment Year 2010-11)

Sheetal Ranwala 602, Symphony Plot No. 269 Junction of 8 th & 12 th Road, Khar West Mumbai-400 052.	Vs.	ACIT-19(1) Room No. 322 Piramal Chambers Lalbaug Parel Mumbai-400 012.
(Appellant)		(Respondent)

PAN No.ADMPR0613D

Assessee by	Shri Jitendra Jain
Department by	Shri A.K. Kardam
Date of Hearing	20.10.2016
Date of Pronouncement	20.10.2016

O R D E R

Per B.R. Baskaran (AM) :-

The appeal filed by the assessee is directed against the order dated 28.10.2014 passed by the learned CIT(A)-30, Mumbai for A.Y. 2010-11 on the following issues :

- a) Assessment of short term capital gain arising from sale of shares as business income.
 - b) Disallowance made u/s. 14A of the Act.
2. The assessee is an individual and she filed her return of income for the year under consideration declaring a total income of ₹ 29.52 lakhs. The total income included short term capital gain of ₹ 48,96,441/- arising on sale of shares, against which brought forward short term capital loss of ₹ 30,47,389/- was adjusted. The AO took the view that the assessee is carrying on purchase and sale of shares in a systematic and organized way. Further the volume of transaction was also considered to be very high. It was also seen that the assessee is carrying on the activity year after year. Accordingly he took the view that there is continuity and regularity in purchase and sale of shares.

Accordingly he held that the assessee is carrying on shares trading activity as a trader and not as investor. He accordingly assessed the short term capital gain of ₹ 48,96,441/- as business income of the assessee. The learned CIT(A) also confirmed the same and hence the assessee has filed this appeal before us.

3. At the time of hearing learned AR submitted written submissions and contended that the activities of the assessee, if examined in terms of various criteria listed out by the CBDT and Courts, would lead to a conclusion that the assessee is acted as an investor only. For the sake of convenience we extract below the written submissions given by learned AR :-

1. *The assessee has shown shares as investment in the balance sheet which is at page 14 of the paper book. There is no interest bearing borrowings which is evident from page 14 of the paper book. The interest-free unsecured loan is from the family members and which are brought forward from earlier years and the same is evident on comparison of balance sheet as on 31-03-2010 and 31-03-2009. The relevant pages are page 14 and 38 of the paper book.*
2. *The assessee's own fund is Rs. 3.14 Cr. which is more than the investment in shares and hence the shares are purchased from own funds.*
3. *All the shares on which gain arose is delivery based transaction and the same is evident from pages 20 to 29 which are demat accounts and page 13 which is a statement of short-term capital gain.*
4. *The assessee has earned capital gain by making investment in only 12 scrips and out of these 12 scrips, 4 scrips are out of earlier year. This is evident from page 13 of the paper book. The closing investment is only in scrips of 6 companies and same is evident from page 15.*
5. *The Revenue has accepted the capital gains on similar facts in all the assessment years except the year under consideration. Assessment for A.Y. 2009-10 and 2013-14 has been made under section 143(3) of the Act. The assessment order and the details for A.Y. 2009-10 are at pages 31, 35 and 40 of the paper book and assessment order for A.Y. 2013-14 is handed over across the bar,*

6. *Out of short-term capital gain of Rs. 48.96 lakhs, Rs. 1.6 lakhs is on account of holding of shares which are less than 1 month, Rs. 30.20 lakhs is on account of shares held for less than 3 months, and the balance Rs. 18 lakhs is from the scrips held for more than 3 months.*
 7. *As per Circular No.4 of 2007 dated 15-06-2007, para 10, an assessee can hold shares on account of investment as well as stock-in-trade. In the instant case, AO is therefore not justified in assessing capital gain as business income on the ground that the firm in which assessee is a partner is engaged in the business of buying and selling shares.*
 8. *As per Circular No.6 of 2016 dated 29-02-2016 if the assessee opts for treating the shares as investment then same has to be assessed as capital gain.*
 9. *As per para 8 of Instruction No.1827 dated 31-08-1989, one of the parameters to decide the issue is under what head shares are reflected in the balance sheet. It is submitted that and as evident from page 14 of the paper book the shares have been reflected under the head investment in the balance sheet.*
 10. *The parameter of dividend is not a material factor in the current scenario where even the IPO are issued at a huge premium and the face value of the shares is Re.1/. Furthermore dividends are declared on the face value and the shares are acquired from the secondary market at the market price with an intention to earn gain from appreciation in the value of the shares. In the instant case the rate of dividend on investment made is 0.3% which is more than rental income on real estate investment which fetches rate of return of 0.25%.*
 11. *The assessee relies upon the submissions made before CIT(A) and which are at page 1 of the paper book.”*
4. The Ld D.R, on the contrary, supported the order passed by Ld CIT(A).
 5. We have heard the parties and perused the record. We notice that the Ld CIT(A) has observed that the assessee has borrowed funds from a family member and her spouse. The Ld A.R pointed out that they are interest free funds, meaning thereby, the assessee did not incur any interest expenditure. In the written submissions, the assessee has also given reasons for receiving

lower amount of dividend income. The Ld CIT(A) has observed that the assessee has dealt in 196074 number of shares. The assessee has pointed out that she has dealt in only 12 scrips, out of which four scrips were bought last year. Thus, it is seen that the assessee has purchased and sold higher number of shares in respect of 12 scrips only, meaning thereby, the volume cannot be taken to be high. We notice that holding period of shares for major portion of shares is reasonable. We further notice that the assessing officer has accepted the profit as Capital gains in AY 2009-10 and 2013-14 in the scrutiny assessment made u/s 143(3) of the Act. It is an established principle that a person can act both as trader and investor.

6. Hence, on a conspectus of the matter, we are of the view that there is no reason to assess the capital gains arising on sale of shares as business income. On a cumulative consideration of various factors, we are of the view that the assessee has acted as an investor only in respect of the impugned transactions. Accordingly we set aside the order passed by Ld CIT(A) on this issue and direct the AO to assess the gains arising on sale of shares under the head Capital gains only.

7. The next issue relates to the disallowance made u/s 14A of the Act. The assessee did not incur any expenses and accordingly contended that no disallowance u/s 14A is called for. However, the tax authorities have taken the view that the computation of disallowance under Rule 8D is made on "deemed basis" and hence the disallowance is required to be computed u/s 14A read with Rule 8D of the IT Rules.

8. We heard the parties on this issue and perused the record. A perusal of the statements of total income of the assessee would show that the assessee did not claim any expenditure against any income. The question of apportionment of expenses between taxable income and exempt income would arise only if any expenditure is claimed by the assessee. Hence we are unable to agree with the view taken by the Ld CIT(A) that the provisions of Rule 8D

provide for “deemed disallowance”. It is well established proposition now that the assessing officer can resort to compute disallowance under Rule 8D only if he is not satisfied with the computation made by the assessee having regard to the accounts of the assessee. Since the assessee has not claimed any expenditure, in our view, there is merit in the contentions of the assessee that no disallowance u/s 14A is called for. Accordingly we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete this disallowance.

9. In the result, the appeal filed by the assessee is allowed.

Order has been pronounced in the Court on 20.10.2016

Sd/-
(RAMLAL NEGI)
JUDICIAL MEMBER

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

Mumbai; Dated : 20/10/2016

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