

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" Bench, Mumbai
Before S/Shri B.R. Baskaran (AM) & Ramlal Negi (JM)

I.T.A. No. 5469/Mum/2006
(Assessment Year 1995-96)

Shri Madan I. Jain B-9, Bhangwadi Kalbadevi Road Mumbai-400 002. (Appellant)	Vs.	DCIT, Circle 4(1) Inv. Mumbai. (Respondent)
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Assessee by	Shri V.K. Tulsian
Department by	Shri Sanjeev Jain
Date of Hearing	7.6.2016
Date of Pronouncement	7.6.2016

O R D E R

Per B.R. Baskaran, AM :-

The appeal filed by the assessee is directed against the order dated 27-01-2005 passed by Ld CIT(A)-IV, Mumbai and it relates to the assessment year 1995-96. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the addition of Rs.25.45 lakhs made by the assessing officer as against the income of Rs.4.58 lacs declared by the assessee.

2. The assessee herein is a Chartered Accountant by profession. He was subjected to search u/s 132 of the Act on 5.1.95. During the course of search action, undisclosed investments made in shares were found and the assessee disclosed a sum of Rs.25.45 lakhs as detailed below:-

Shares found and seized by the department	10,37,000
Shares sent for transfer of names	13,00,000
Amount invested in furniture and fixtures	2,08,000

	25,45,000
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At the time of filing return of income, the assessee declared the shares of Rs.23,37,000/- (Rs.10,37,000/- + Rs.13,00,000/-) as stock in trade and accordingly prepared a profit and loss account by showing further purchase of shares, sale of shares and closing stock. The assessee also credited the amount of Rs.25.45 lakhs declared by him during the course of search in the Profit and loss account. Accordingly he arrived at a profit of Rs.4,58,890/- in the said profit and loss account and disclosed the same in the return of income.

3. The assessee did not co-operate before the AO and hence the AO completed the assessment u/s 144 of the Act to the best of his judgement. The AO did not consider the assessee a trader in shares and accordingly rejected the profit and loss account prepared by the assessee. Accordingly he assessed the entire amount of Rs.25.45 lakhs as income of the assessee. In the appellate proceedings before Ld CIT(A), the first appellate authority set aside the matter to the file of the AO for doing assessment de-nova. In the set aside proceedings also, the assessee did not co-operate and hence the AO completed the assessment again u/s 144 of the Act. Before Ld CIT(A), the assessee explained the reasons for not appearing before the AO and the same was found acceptable to Ld CIT(A).

4. The assessee had submitted that he has carried on the activity of trading in shares in the name of his brother named Shri Sanjay. He further submitted that he has submitted in the sworn statement taken u/s 132(4) of the Act that he has been trading in shares in the name of his family members. He further submitted that he was doing trading activities in cash market through a broker named Shri R.R. Bohra. The assessee furnished copies of bills for purchase and sales, but due to the fire that broke out in the premises of the above said broker which destroyed all the records, the assessee could not furnish other records.

Accordingly he prayed that the profit declared in the profit and loss account should be accepted.

5. The Ld CIT(A) called for a remand report from the AO on the explanations furnished by the assessee. In respect of the addition of Rs.25.45 lakhs made by the AO, the assessing officer reported that the assessee cannot be considered to be a trader in shares. He further reported that the assessee has failed to furnish all the relevant details that are required to prove the claim of purchase and sales. He also reported that bills submitted by the assessee in support of purchase and sale of shares cannot be relied upon unless they are accompanied by the contract notes. He also reported that there is some mismatch in the claim of purchase and sales. The Ld CIT(A) recast the Profit and Loss account by making certain adjustments and arrived at a profit of Rs.21.26 lakhs as against Rs.4.85 lakhs reported by the assessee. However, since the assessee was not considered to be a trader, the Ld CIT(A) confirmed the addition of Rs.25.45 lakhs made by the AO.

6. We heard the parties and perused the record. We notice that the assessee has been submitting all through that he has carried on the activity of trading in shares in the name of his family members. Accordingly he treated the shares found during the course of search and also subsequent purchases as his trading stock. The closing stock available as at the year end was valued by the assessee at market value, if it was found to be lower than the cost. We notice that the tax authorities have rejected the claim mainly on the reason that the assessee has admitted in the sworn statement that he has made in undisclosed investment in shares. Further it was noticed that the assessee has declared capital gains on sale of shares.

7. We have earlier noticed that the assessee was practising as Chartered Accountant and he has admitted that he has carried on trading activity in shares in the name of his family members. Under these set of facts, we are of the view that the Ld CIT(A) was not correct in referring to the capital gains declared by the assessee in his return of income. The purchase of shares, in the accounting parlance, may be accounted as "current investment" or "fixed investment" depending upon the character in which it is going to be retained. Generally trading asset is referred to as current investment. Accordingly, we are of the view that the expression used in the statement given u/s 132(4) cannot be taken as determinative factor for deciding the character of the purchase of shares. On the contrary, the statement given by the assessee that he has been carrying on trading in shares in the name of family members has not been controverted by the revenue. Under these set of facts, we are of the view that there is no reason to doubt the claim that the assessee has carried on trading activities in shares.

8. With regard to the purchase and sale of shares, we notice that the assessee has produced bills in support of the same. The assessee also expressed its inability to support other documents, since the records of the broker got destroyed in fire. We notice that the assessee has furnished necessary proof to support the claim of fire and those documents were not disproved by the assessing officer. We notice that the AO has reported that the purchase and sale transactions were not found in the records of stock exchange. We notice that the assessment year involved is 1995-96, i.e., prior to introduction of dematerialisation scheme, and during those period, the shares used to be traded in cash till the book closure time. Hence, it was not always necessary that the purchase and sales should be routed through the stock exchange. We are also of the view that the inability of the assessee to produce

other documents for the reasons beyond his control cannot be used against the assessee. Accordingly, we are of the view that the tax authorities, in the facts and circumstances of the case, are not justified in rejecting the claim of purchase and sale of shares.

9. Having held that the assessee's claim of trading in shares should be accepted, we are of the view that the closing stock valued by the assessee should also be accepted, since the valuation was not controverted with any tangible material. Accordingly, we are of the view that there is no reason to reject the profit and loss account prepared by the assessee. Accordingly, we set aside the order of Ld CIT(A) passed on this issue and direct the AO to accept the profit declared by the assessee in the place of Rs.25.45 lacs assessed by him.

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

Order has been pronounced in the Open Court on 7.6.2016.

Sd/-
(RAMLAL NEGI)
JUDICIAL MEMBER

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

Mumbai; Dated : 7/6/2016

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//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai

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