

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH 'A' KOLKATA

[Before Hon'ble Shri S.S.Viswanethra Ravi, JM & Dr.Arjun Lal Saini, AM]

ITA No.39/Kol/2014
Assessment Year : **2010-11**

D.C.I.T., Circle-5,
Kolkata

(Appellant)

-versus-

M/s. Pacific Plantations Ltd.
Kolkata

[PAN: AABCP5418P]

(Respondent)

For the Appellant : Shri Sallong Yaden, Addl.CIT

For the Respondent : Shri R.K.Patodi, FCA

Date of Hearing : 02.11.2016

Date of Pronouncement : 23.11.2016

ORDER

Per Dr.Arjun Lal Saini, AM

The captioned appeal filed by the Revenue pertaining to A.Y.2010-11, is directed against the order passed by the Commissioner of Income Tax –(Appeals) – VI, Kolkata, in Appeal No.13/CIT(A)-VI/Cir-5/13-14/Kol, dated 07.10.2013, which in turn arises out of an order passed by the Ld. Assessing Officer u/s 143(3) of Income Tax Act, 1961 (in short, 'the Act') dated 04.03.2013.

2. The brief facts qua the assessee are that the return of income declaring total income of Rs.nil was filed by the assessee on 25.09.2010. The return was duly processed u/s 143(1) of the Act on 28.03.2012. Later on the case was selected for scrutiny u/s 143(3) of the Act, and the AO has completed the assessment by making the addition on account of cash credit u/s 68 of the Act at Rs.98,23,589/- and addition on account of income from sale of shares at Rs.2,92,31,631/-. The AO also disallowed the amount attributable to speculation business at Rs.1,29,832/-. During the assessment proceedings the AO observed that the assessee did trading in the share market and he is purchasing of shares and selling of shares frequently. Therefore, the

account before the assessing officer. Under the circumstances, the loan received from the party cannot be treated as unexplained cash credit unless any evidence is brought on record to establish that the relevant transaction was not genuine. A general and vague observation that creditworthiness was not established and the lender was typical 'jarna kharchi company' engaged in the activity of providing accommodation entries, as alleged by the assessing officer, is not sufficient in this regard. Mere fact, that the returned income is low, is also not sufficient to draw any adverse inference, if the loan is duly reflected in the balance sheet of the lender. So far as the appellant is concerned, it has produced confirmation for the loan taken in cheque from the lender, who is assessed to income tax and has thus discharged its onus. The addition of Rs.98,23,589/- as cash credit u/s 68 of the Act is, therefore, not sustainable and accordingly deleted. "

4. Not being satisfied with the order of the Id. CIT(A) the Revenue is in further appeal before us and has taken the following grounds of appeal :-

"1. That on the facts and circumstances of the case, the CIT(A) erred in holding that unsecured loans of Rs. 15,00,000/- received from M/s. Panchsheel Vyapar (P) Ltd. and interest paid on unsecured loans were genuine ignoring the fact that the primary requirement of existence and creditworthiness of the lender parties were not established in independent external verification.

2. That on the facts and circumstances of the case, the CIT(A) erred in law as well as on facts in holding that the income accrued from transaction of shares of Rs. 2,92,31,631/- was short term capital gain ignoring the fact that the huge volume and frequency of transaction defeated the purpose of investment and indicate the motive of the appellant of share trading.

3. That the appellant craves for leave to add, delete or modify any of the grounds of appeal before or at the time of hearing."

5. The first ground raised by the Revenue relates to unsecured loans of Rs.15,00,000/- received from M/s. Panchsheel Vyapar (P)Ltd.

The brief facts qua the issue is that the assessee has shown outstanding unsecured loan of Rs.90,00,000/- out of which Rs.15,00,000/- has been taken during the year under consideration. The AO issued notice u/s 133(6) of the Act to the lender asking them to furnish the details and their identity, genuineness of the transaction and creditworthiness etc. The AO during the assessment proceedings found that none of the lenders exist at the address provided by the assessee. The actual lenders engaged in lending business will have their own infrastructure, market reputation, sufficient fund available with them and known to everybody in their locality. In the instant case, the existence of lenders could not be ascertained after exhaustive enquiry. Therefore the AO held that the above lenders are typical jama-kharchi companies engaged in the

Rs..98,23,589/-, the majority of the loans were carried forwarded from the earlier years. Therefore the AO cannot make addition u/s 68 of the Act on the loan which is coming as carry forward from the preceding assessment years. During the year under consideration the assessee received Rs.15,00,000/- from M/s. Panchaseel Vyapar Pvt. Ltd through cheque, and the assessee has paid to M/s. Panchaseel Vyapar Pvt. Ltd. Rs.10,00,000/- through cheque. M/s. Panchaseel Vyapar Pvt. Ltd. Filed copies of acknowledgement of income tax return, balance sheet and profit and loss account before the AO. The AO did not find any evidence/reason where he could make addition u/s 68 of the Act. Out of Rs.15,00,000/ received by the assessee Rs.10,00,000/- has been paid during the year thus balance of Rs.5,00,000/ is not a material amount. The assessee furnished Balance Sheet, Profit & Loss account and confirmation before AO to verify Rs. 5,00,000/- but the AO did not bring any cogent evidence to show that these documents are false. Therefore, considering the above factual position we do not hesitate to confirm the order passed by Id. CIT(A).

5.4. In the result ,the appeal filed by the revenue on this issue is dismissed.

6. The next ground relates to whether transaction in shares of Rs.2,92,31,631/- is a short term capital gain or income from other sources.

The brief facts qua the issue is that the assessee made investments in shares and whenever he feels liquidity problem he sells the shares. During the assessment proceedings the AO found that buying and selling of shares turnover are higher, and only one demat account is maintained by the assessee, and the period of holding of shares is less than one year. The interest is being paid by the assessee on borrowed money. The borrowed money is used by the assessee for trading and investments. The AO also noted that there is a high turnover in the trading of shares. The assessee is dealing in trading of shares with the intention of making quick profit on a huge turn over and the period of holding of a majority of the investment was few days. Therefore considering these aspects the AO has treated the said amount of Rs.2,92,31,631/- as business income. Whereas the assessee has been showing similar transactions since last many years under the head short term capital gain.

the Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years;”

The Id. AR for the assessee has also submitted that the assessee has been showing gain on account of sale of shares since long and the AO has been allowing the same under the head income from short term capital gain. He has submitted that for A.Y.2009-10 the AO has completed the assessment u/s 143(3) of the Act where he has allowed the assessee the short term capital loss to be carried forwarded at Rs.5,01,20,209/-. The Id. AR further pointed out that the revenue had in earlier assessment years, accepted the treatment of income under the head short term capital gain given by the assessee. The Id. AR also relied on the judgment of Bombay High Court in the case of CIT vs Gopal Purohit 228 CTR 582 which observed as under :-

"The Tribunal correctly accepted the position that the principle of res judicata is not attracted since each assessment year is separate in itself. The Tribunal held that there ought to be uniformity in treatment and consistency when the facts and circumstances are identical, particularly in the case of the assessee. This approach of the Tribunal cannot be faulted. The Revenue did not furnish any justification for adopting a divergent approach for the assessment year in question."

The SLP filed by the revenue against the said decision has also been dismissed by the Hon'ble Supreme Court as reported in 334 ITR 308 (St.). The Id. AR also relied on the judgement of the Hon'ble Jaipur Bench of ITAT in the case of DCIT, Circle-2, Jaipur vs Shri Mahendra Kumar Bader in ITA No.605/JP/2013 where the Hon'ble ITAT has considered the same identical issue.

6.3. Having heard the rival submissions, perused the material on record, we are of the view that there is merit in the submissions of the assessee, as the proposition canvassed by the Id. AR for the assessee are supported by the case laws cited above and the facts narrated by him above. As the Id. AR pointed out that the assessee has been giving out the same activity on a comparable scale for a number of years all along shares of investments. Accordingly the assessee had income from sale as short term capital gain. The revenue has also accepted such accounting treatment in the earlier years. In the assessee's case under consideration in the preceding previous year