IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai

Before Shri Jason P. Boaz, Accountant Member
and Shri Sandeep Gosain , Judicial Member

ITA No. 3295/Mum/2014
(Assessment Year: 2007-08)

Ms. Vaishali V. Shah 15/7 Navjeevan Society Lamington Road Mumbai 400008	Vs.	A C I T – 15 (2) Matru Maindr Room No. 113, Tardeo Mumbai 400007
Appellant		**Respondent**

PAN – AQPPS2455Q

Appellant by: None
Respondent by: Shri Ravinder Sindhu

Date of Hearing: 26.10.2016
Date of Pronouncement: 28.10.2016

O R D E R

Per Jason P. Boaz, A.M.

This appeal by the assessee is directed against the order of the CIT(A)-26, Mumbai dated 12.02.2014 for A.Y. 2007-08.

2. The facts of the case, briefly, are as under: -

2.1 The original assessment in the case of this assessee for A.Y. 2007-08 was completed under section 143(3) of the Income Tax Act, 1961 (in short, 'the Act') vide order dated 20.11.2009 wherein the income was determined at ₹93,66,790/- in view of the Assessing Officer (AO) holding short term capital gain (STCG) of ₹92,76,279/- from sale of shares declared by the assessee to be income from speculation business. On appeal, the CIT(A)-26 vide order dated 05.05.2010 held the transaction to be capital gains and not a speculative transaction. On further appeal, a Coordinate Bench of this Tribunal vide order dated 15.03.2013 set aside this order of the CIT(A) and restored the matter back to the file of the learned CIT(A) for passing fresh orders after examination in the light of their observations, which are extracted hereunder: -

"We have perused the records and considered the rival contentions carefully. The dispute is regarding nature of income from purchase and sale of shares by the assessee who belonged to the dame group. The assessee had purchased shares from the same sub-broker who in turn had purchased the shares from the main broker. The enquiry from the sub-broker revealed that it had not taken delivery on behalf of the assessees. The sub-broker had only stated that the shares remained with the main broker as there were no instructions for the clients to take delivery. It was also submitted by sub-broker that it had not maintained any demat account of the clients. After considering the material on record, the AO observed that the income from share transaction had to be considered either as speculation or normal business income but since there was no evidence of delivery, the AO treated the income as speculation income. In appeal CIT(A) observed that sub-broker had stated that the shares remained with main broker and from this he concluded that delivery had been taken by the main broker which has to be considered as delivery by the assessee. CIT(A) also observed that there was no dispute that delivery had been taken by main broker. However, we note that there is no evidence that the delivery had been taken by main broker. Since the issue of delivery was still in dispute we agree with the submission of ld. DR that finding of CIT(A) that there was no dispute of delivery was not correct. No enquiry has been made from the main broker confirming that it had taken delivery on behalf of the assessee. Moreover even if delivery had been taken CIT(A) was required to examine the other aspect as to whether income from share transaction could be considered as speculative income or normal business income. Details of share transactions placed in paper book reveal that shares have been sold after holding for a short period and in some cases there are repeated purchases and sale of shares in same scrips which apparently are not attributes of an investor. Considering the facts and circumstances of the case the matter requires fresh examination at the level of CIT(A). We, therefore, set aside the order of CIT(A) and restore the matter to him for passing a fresh order after necessary examination in the light of the observations made above and after allowing opportunity of hearing to the assessee."

2.2 In the second round of proceedings, the learned CIT(A)-26, Mumbai dismissed the assessee's appeal holding as under: -

"3.2.7 Therefore, all the share transactions showing capital gains in the return are bogus. Accordingly, the addition made by the AO is upheld and grounds of appeal are hereby dismissed.

3.2.8 As per ITAT order in the case of appellant and the operative part reproduced in para 3.1.2 of this order the appellant was to lead evidence in support of his claim that delivery of the shares was not in dispute and that the delivery was taken and given. Since no verifiable evidence in support of delivery has been produced and even the name and address of the main broker has not been given to facilitate the

enquiry and also in view of the aforesaid orders of ITAT in the case of Mukesh Choksi group, it is hereby held that no genuine transaction in shares was ever done by the appellant and therefore the question of any delivery and evidence in support thereof does not arise. Therefore, though the AO in this case has assessed the income shown in bogus shares transaction as speculation income, the same is correctly assessable as 'Income from other sources' since the share transactions are bogus. The AO is directed to assess the same under the head "Income from other sources".

3.1 Aggrieved by the order of the CIT(A)-26, Mumbai dated 12.02.2014 for A.Y. 2007-08, the assessee has preferred this appeal raising the following grounds: -

"1. On the facts and in the circumstances of the case, the learned CIT(A) erred in dismissing the appeal.

2. On the facts and in the circumstances of the case, the learned CIT(A) erred in dismissing the appeal and that too without giving full and proper opportunity of being heard in the matter.

3. On the facts and in the circumstances of the case, the learned CIT(A) erred in dismissing the appeal and that too without appreciating fully and properly the facts of the case.

4. On the facts and in the circumstances of the case, the learned CIT(A) erred in upholding the action of the A.O. in disallowing an amount of Rs.92,76,279/- being sale of shares as a business income.

5. On the facts and in the circumstances of the case, the learned CIT(A) erred in taking the additional material on record which was not before A.O.

6. The learned CIT(A) failed to appreciate the details called for, the assessee has established all the requirement of the act beyond any doubt.

7. The learned CIT(A) failed to take and has considered additional evidence not available before the A.O. during the course of hearing at the time of assessment."

3.2 The case was fixed for hearing on various dates, but on all these days, either none was present for the assessee or adjournment was sought for by the learned counsel for the assessee on various grounds. Even notice issued by RPAD has been returned back unserved. On one occasion adjournment was sought by the learned D.R. When the case was called for hearing on 26.10.2016, none was present on behalf of the assessee, but the learned D.R. was present and ready to argue the case for Revenue. In

the circumstances as mentioned above, we are of the view that the assessee does not appear to be interested in pursuing this appeal seriously. In that view of the matter, we proceed to dispose off this appeal with the assistance of the learned D.R. for Revenue and the material on record.

3.3 All the grounds raised at S.Nos 1 to 7 (supra) mainly pertain to the single issue; raising contentions that the authorities below erred in treating the income of ₹92,76,279/- as business income rather than as declared by the assessee as STCG on sale of shares. In these grounds, the assessee, inter alia, has also contended that the learned CIT(A) dismissed the assessee's appeal without allowing the assessee full and proper opportunity of being heard; without appreciating the facts of the case properly; without appreciating that the assessee has established all the requirements of the Act beyond doubt and by dismissing the assessee's appeal by taking on record additional evidence that was not before the AO in assessment proceedings.

3.4 The learned D.R. for Revenue strongly relied on the orders of the authorities below. According to the learned D.R., except for raising various contentions in the grounds raised (supra), the assessee has not been able to bring on record any material evidence to establish that the learned CIT(A) passed the impugned order in violation of the principles of natural justice; that the impugned order was passed by taking on record additional evidence or that the facts of the case was properly appreciated while coming to the finding that the profit on sale of shares was not STCG as claimed by the assessee but was to be assessed as income from other sources. It was prayed that inspite of the assessee being provided many opportunities of hearing before the Tribunal, since she was unable to bring any material evidence on record to controvert the findings of the learned CIT(A) on this issue, the assessee's appeal be dismissed.

3.5.1 We have heard the learned D.R. for Revenue at length and perused and carefully considered the orders of the authorities below to elicit the views and contentions of both the assessee and the Revenue. The learned

CIT(A) has considered the submissions of the assessee and views of the AO in the impugned order. In this regard it would be in the fitness of things to extract hereunder the relevant findings rendered in the impugned order by the learned CIT(A) at paras 3.28 and 4 thereof: -

> *3.2.8 As per ITAT order in the case of appellant and the operative part reproduced in para 3.1.2 of this order the appellant was to lead evidence in support of his claim that delivery of the shares was not in dispute and that the delivery was taken and given. Since no verifiable evidence in support of delivery has been produced and even the name and address of the main broker has not been given to facilitate the enquiry and also in view of the aforesaid orders of ITAT in the case of Mukesh Choksi group, it is hereby held that no genuine transaction in shares was ever done by the appellant and therefore the question of any delivery and evidence in support thereof does not arise. Therefore, though the AO in this case has assessed the income shown in bogus shares transaction as speculation income, the same is correctly assessable as 'Income from other sources' since the share transactions are bogus. The AO is directed to assess the same under the head "Income from other sources.*
>
> *4. In the result, the appeal is dismissed."*

3.5.2 On a perusal of the directions of the Coordinate Bench of this Tribunal (extracted at para 2.1 of this order), the contrary views and contentions of the assessee and the authorities below, the peculiar facts and circumstances of this case and the finding of the learned CIT(A) (extracted at para 2.2 and 3.5.1 of this order), we are of the considered view that the learned CIT(A) has judiciously followed the directions of the Coordinate Bench of this Tribunal in rendering his finding. In the case on hand, the assessee was directed by the Tribunal to lead evidence in support of her claim that delivery of the shares was infact taken and given. However, it is seen that inspite of being afforded opportunities in this regard, the assessee failed to bring on record any basic verifiable evidence to support the claim that delivery of shares had taken place. The assessee failed to give even the name and address of the main broker so that enquiries/verification as to the genuineness of the assessee's claim could have been carried out. It is in that view of the matter, that the learned CIT(A) held that income earned in the bogus share transaction as 'Income from Other Sources'. Even before us, no evidence has been brought on

record to controvert the findings rendered by the learned CIT(A). In these peculiar facts and circumstances of this case we find no reason to interfere with the findings rendered by the learned CIT(A) on this issue and therefore uphold the same. Consequently, the grounds 1 to 7 raised by the assessee (supra) are dismissed.

4. In the result, the assessee's appeal for A.Y. 2007-08 is dismissed.

Order pronounced in the open court on 28th October, 2016.

Sd/-	Sd/-
(Sandeep Gosain)	**(Jason P. Boaz)**
Judicial Member	**Accountant Member**

Mumbai, Dated: 28th October, 2016

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -26, Mumbai*
4. *The CIT - 15, Mumbai*
5. *The DR, "F" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.