

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES (SMC), JAIPUR

श्री भागचन्द, लेखा सदस्य के समक्ष
BEFORE: SHRI BHAGCHAND, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 489/JP/2013
निर्धारण वर्ष/Assessment Year : 2008-09

Shri Dinesh Kumar Agarwal 1057, Pano Ka Dariba Subhash Chowk, Jaipur	बनाम Vs.	The ACIT Circle- 1 , Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABHPA 4416 E		
अपीलार्थी/ Appellant		प्रत्यर्थी/ Respondent

निर्धारिती की ओर से/ Assessee by: None (Date was noted)
राजस्व की ओर से/ Revenue by: Smt. Poonam Rai, DCIT-DR

सुनवाई की तारीख/ Date of Hearing : 16/01/2017
घोषणा की तारीख/ Date of Pronouncement : 19 /01/2017

आदेश / ORDER

PER BHAGCHAND, AM

The assessee has filed an appeal against the order of the Id. CIT(A)I, Jaipur dated 6-02-2013 for the assessment year 2008-09 raising following grounds of appeal.

“1. That the Id. CIT(A) has erred in law and fact in upholding AO’s order of invoking the provision of Section 145(3) in spite of fact that regular and proper books of accounts are maintained by the appellant duly audited under facts and circumstances of the case, he ought to have assessed the income as per statement of accounts submitted.

2. That the Id. CIT(A) has erred in law and fact in upholding AO's order by treating Short term capital gain as business income as assessee has purchase and sale shares and has gain as Short term capital gain of Rs. 11,55,663/- but AO has treated the same as business income instead of Short term capital gain which is wrong and unjustified deserves to be deleted.

2.1 None appeared on behalf of the assessee in spite of noting the date fixed for hearing on 16-01-2017. Consequently the Bench is left with no alternative but to decide the appeal on merits, ex parte qua the assessee, after hearing Id. DR and after perusal of the materials available on record.

3.1 Apropos ground No. 1 and 2 of the assessee, the facts as emerges from the order of the Id. CIT(A) is as under:-

Ground No.1

“4.3 I have carefully perused the order of the AO and the submissions of the A.R. It is a fact that purchases from M/s. Century Gems, M/s. Anshu Gems & M/s. Vijay Gems could not be verified and to that extent the assessee failed to discharge its onus of getting the purchases verified. The Hon'ble ITAT Jaipur Bench has consistently held in the case of gems and jewellery traders of Jaipur that un-verifiability of purchases are a sufficient ground for invoking the provisions of Section 145(3). Therefore, the decision of the AO to reject the books of accounts of the assessee by invoking the provisions of Section 145(3) is upheld.”

Ground No. 2

6.3 I have carefully perused the order of the AO and the submissions of the AR. As per the details noted by the AO on page 9 of her order, it is seen that the appellant sold and purchased shares of ICICI Bank and Reliance Power on the same date resulting in profits. Since the transactions are intra-day they are clearly speculative as per the provisions of section 43(5) which is quoted below for question clarity:

“ Speculative transaction” means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips”.

The AR of the appellant has not given any reason as to why intra-day transactions are not to be treated as speculative transactions considering that the scrips could not have been delivered on the same date of purchase and sale. The arguments furnished are, therefore, not relevant to the facts of the case of the appellant. It is, therefore, held that the intra-day transactions in scrips were speculative transactions as defined by section 43(5) and so the income from these speculative transactions is required to be taxed as business income under Explanation 2 to section 28. Therefore, the decision of the AO to treat Rs. 11,55,663/- as business income u/s 43(5) is confirmed.

3.2 During the course of hearing, the ld. DR relied on the orders of the authorities below.

3.3 I have heard the ld. DR and perused the materials available on record. As regards Ground No. 1 of the assessee, it is noticed that the assessee firm derived income from manufacturing and trading of gem

stones and jewellery, Capital Gains and other source. It is further noted that the assessee had shown purchases from M/s. Century Gems, M/s. Anshu Gems and M/s. Vijay Gems. However, the Investigation Wing of the Department during search and seizure proceedings in certain cases found that M/s. Century Gems, M/s. Anshu Gems and M/s. Vijay Gems were indulging in providing entries like issuing sale bills without actual delivery of goods. Besides this, the BCTT Wing of the Income-Tax Department conducted surveys in various cases in the year 2007-08. During the course of survey, it was found that various persons were indulging in the practice of issuing bogus bills in the trade of gems and jewellery and they had admitted in their respective statements recorded on oath that they were merely issuing bills and no real sale and purchases were being made by them and thus they were not doing any business activities and were merely providing accommodation entries. The AO required the assessee to get these purchases verified by issuing show cause notice on 25-11-2010 but the assessee failed to justify it. Summons was issued to the above parties but they remained unserved. According to the AO, the purchases made by the assessee from M/s. Century Gems, M/s. Anshu Gems and M/s. Vijay Gems were unverifiable. In this

situation, the AO rejected the books of account of the assessee by invoking the provisions of Section 145(3) of the Act which has been sustained by the Id. CIT(A) in first appeal. As regards the Ground No. 2 of the assessee, the Id. CIT(A) noted from the order of the AO that the assessee had shown Short term capital gain of Rs. 11,55,563/- and the details of which is noted on page 9 of assessment order as under:-

Name of scrip	Opening stock	Qty. purchase	Date of purchase	Total amount	Qty. sold	Co. per share	Total amount	Date of purchase
ICICI Bank	Nil	11200	19-03-08	8571959	11200	-	8991810	19-03-08
Reliance power	Nil	2000	25-03-08	9522190	2000	-	9697911	25-03-08
Reliance power	Nil	42816	18-03-08	14512609	42816	-	15025543	18-03-08

It is seen that the above transactions were intra-day in nature and were hit by provisions of Section 43(5). A show cause notice dated 20-10-2010 was issued to the assessee by the AO as to why the transactions should not be treated as speculative transactions and income be consequently treated as business income. The assessee filed by the reply dated 29-11-2010 but the same was not found to be applicable by the AO as the provision of the section clearly states that intra-day delivery based transactions are to be considered as speculative transactions and need to be taxed at normal rates rather than subsidized rate of tax as applicable on STCG earned on equity shares. The AO took the support of CBDT

circular Nos. 1857 dated 31-08-1989 and No.04/2007 dated 16-06-2007.

The AO also relied on following case laws to this effect.

- (i) Rajputana Textile (Agencies) Ltd. vs. CIT (1961) 42 ITR 743 (SC)
- (ii) W.L. Knopp vs. CIT 16 ITR 398 (Mad)
- (iii) Raja Bahadur Visheshwar Singh vs. CIT 41 ITR 685
- (iv) Bharat Development (P) Ltd. vs. CIT (1980) 4 Taxman 58 (Del.)

Conclusively, the AO treated the income of Short term capital gain of Rs. 11,55,563/- as "Income from Business or Profession". In first appeal, the Id. CIT(A) confirmed the action of the AO treating Rs. 11,55,663/- as business income u/s 43(5) of the Act. Now the assessee is in appeal before this Bench against the order of the Id. CIT(A) dated 6-02-2013 on both the issues (supra). It is also noted that during the course of hearing none appeared on behalf of the assessee on date of hearing fixed for 16-01-2017 in spite of noting the date of hearing. Hence, in view of the above facts, circumstances of the case and the materials available on record, I concur with the findings of the Id. CIT(A). Thus the appeal of the assessee on both the grounds (supra) is dismissed.

4.0 In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 19 /01/2017.

Sd/-
(भागचन्द)
(Bhagchand)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 19 /01/ 2017

*Mishra

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

1. अपीलार्थी / The Appellant-Shri Dinesh Kumar Agarwal, Jaipur
2. प्रत्यर्थी / The Respondent- The ACIT, Circle-1, Jaipur
3. आयकर आयुक्त(अपील) / CIT(A).
4. आयकर आयुक्त / CIT,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 489/JP/2013)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar