

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND
SHRI B. R. BASKARAN, ACCOUNTANT MEMBER**

ITA No.1923/Bang/2018
Assessment Year :2005-06

The Joint Commissioner of Income Tax, Special Range7, Bengaluru.	Vs.	M/s. United Spirits Limited (formerly known as Shaw Wallace Breweries Ltd.), UB Towers, 6 th Floor, 24 VittalMallya Road, Bengaluru – 560 001. PAN : AAFCS 3230 E
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C.O. No.126/Bang/2018 (in ITA No.1923/Bang/2018 Assessment Year :2005-06
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M/s. United Spirits Limited (formerly known as Shaw Wallace Breweries Ltd.), Bengaluru – 560 001. PAN : AAFCS 3230 E	Vs.	The Assistant Commissioner of Income Tax, Circle – 6(3)(1), Bengaluru.
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Revenue by	:	Shri. Pradeep Kumar,CIT(DR)(ITAT), Bengaluru
Assessee by	:	Shri. Jehangir Mistri, Sr. Advocate

Date of hearing	:	02.02.2021
Date of Pronouncement	:	05.02.2021

ORDER

Per N. V. Vasudevan, Vice President:

ITA No.1923/Bang/2018 is an appeal by the Revenue against the order dated 12.03.2018 of CIT(A)-10, Bengaluru, relating to Assessment Year 2005-06. The assessee has filed C.O. against the very same order of CIT(A).

2. Shaw-Wallace Financial Services Ltd., (SWFSL), Kolkata, was a company engaged in the business of financing and investments. For Assessment Year 2005-06, return of income in the name of SWFSL was filed on 31.10.2005 at Income Tax Office Kolkata returning a total income of Rs.16,67,62,650/-. The break up of the total income as per the return of income was as follows:

Business income	Rs. 3,86,94,672
Long term Capital gain (LTCG)	<u>Rs.12,80,67,978</u>
	<u>Rs.16,67,62,650</u>

3. The SWFSL merged with another company by name M/s. Shaw Wallace Breweries Ltd., (SWBL) w.e.f. 1st April 2005 vide a scheme of merger duly approved by the Hon'ble High Court of Kolkata's order dated 26.10.2006 and the Hon'ble High Court of Bombay's order dated 01.12.2006.

4. In the course of assessment proceedings pursuant to the return of income filed on 31.10.2005, the assessee submitted before the AO that on account of the above merger, from and on 01.04.2005 SWFSL ceases to have a separate legal entity and does not exist and no assessment can be framed in the name of a non-existent entity and doing so will render such order of assessment invalid. The AO however passed an order of Assessment dated 31.12.2007 under section 144 of the Income Tax Act, 1961 (hereinafter called 'the Act'). In the assessment so made, since evidence was not produced in respect of expenditure, the expenditure debited to P & L Account was disallowed while completing the assessment, as aforesaid under section 144 of the Act. The LTCG declared by the Assessee was accepted by the AO.

5. This order was sought to be revised under section 263 of the Act on the ground that LTCG of Rs.12,80,67,978/- declared by the Assessee ought to have

been charged to tax as business income. Those proceedings were however dropped because SWFSL ceased to exist on amalgamation with SWBL.

6. The AO was of the view that income declared by the Assessee SWFSL under the head LTCG was in the nature of income chargeable to tax under the head “Income from Business” and therefore he issued a notice under section 148 dated 31.03.2010 on SWBL, the successor in interest of SWFSL, calling upon SWBL to file return of income by 15.04.2010. In response to the above on notice dated. 7.6.2010, SWBL filed a reply dated 28.06.2010 stating that the return of income already filed for the above Assessment Year (by SWFSL the predecessor of SWBL) may be treated as return filed in response to notice u/s.148 of the Act.

7. In the assessment proceedings, the assessee submitted that the initiation of reassessment proceedings under section 148 of the Act was merely a change of opinion and cannot be sustained. In this regard, it is seen from the copy of the reasons recorded by the AO dated 29.03.2010 that no new tangible material has come to the possession of the AO after conclusion of the assessment under section 144 of the Act on 31.12.2007 and the reasons mentioned in para 2 are that the long term capital gain (LTCG) on sale of shares has to be treated as a business profit because the main objects of the assessee was to act a financier and to finance commercial enterprise and that the transaction of sale of shares was made with a definite objective of commercial profit.

8. The particulars of the sale of shares by SWFSL was a sale of two shares of M/s. Lee Hedges and Company Ltd., and 100 shares fo M/s. Shaw Wallace International Ltd., for a consideration of Rs.8,61,32,898/- and Rs.4,19,40,593/- respectively. The cost of the above shares was US\$ 1 per share equivalent to Rs.48.50 and Rs.48 per share respectively. Consequent to the said transaction, the assessee has earned profit of Rs.12,80,68,594/- as under:

Sr. No.	Name of scrip	Total cost	Total sale consideration	Profit
01	M/s. Lee Hedges & Company Ltd.	97	86132898	86132801
02	Shaw Wallace International Ltd.,	4800	41940593	41935793
	T O T A L :	4897	128073491	128068594

The assessee has treated the above transaction as Capital Gains arising out of Long term Investment.

9. The assessee also submitted that the shares in question were shares held by the assessee in its subsidiary which were incorporated in British Virgin Islands. The purpose of setting up of the subsidiary was to consolidate its investment and for the purpose of earning business profit through the subsidiaries business and not to trade in the shares of subsidiary. The assessee also pointed that shares were never treated as stock-in-trade and were disclosed as investment in the financial statements. The assessee also pointed out that the CBDT in its Circular No.4/2007 dated 15/06.2007 has clearly laid down tests for deciding as to when the sale of shares can be regarded as giving rise to business income and those tests laid down in the said circular, if applied to the facts of the assessee's case, the conclusion that can be drawn is that the gain in question has to be regarded as LTCG and not as giving rise to business income. The assessee reiterated that investment in shares of wholly subsidiaries has been clearly spelt out in the financial statements.

10. The AO, however, did not agree with the submissions made by the assessee and he came to the conclusion that the gain on sale of shares has to be regarded as income from business because the cost price was very minimum and the sale price was an astronomical sum. Hence, the intention of the assessee was to make a business profit from the sale of the shares. This is the only reason given by the AO

for coming to the conclusion that the gain on sale of shares has to be regarded as income from business. On the validity of initiation of reassessment proceedings, the AO held that while concluding the assessment under section 144 of the Act by order dated 31.12.2007, the AO did not express any opinion on the LTCG declared by the assessee and therefore there is no question of change of opinion in initiating proceedings under section 148 of the Act.

11. Aggrieved by the order of the AO, the Assessee preferred appeal before the CIT(A). Before the CIT(A), apart from reiterating the stand taken by the assessee before the AO, the assessee also relied on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Kelvinator India Ltd., 320 ITR 561 wherein the Hon'ble Supreme Court has laid down that when assessment is completed under section 143(3) of the Act, the AO cannot initiate reassessment proceedings under section 148 of the Act without coming into possession tangible material after conclusion of such assessment proceedings which can lead to come a conclusion that there is an escapement of income. The Court emphasized that there must be a live link between the reasons recorded and the information coming into possession of the AO.

12. The CIT(A) agreed with the contention of the assessee that the gain on sale of shares would give rise to only LTCG and not income from business. The following were the observations of the CIT(A) in this regard:

“5.4 I have carefully considered the submission of the A/R. It is seen from the records of the case that the shares of M/s Lee Hedges & Co. Ltd were purchased by the appellant in the financial year 2003-04 and those of M/s Shaw Wallace International Ltd. were purchased in the financial year 2001-02. Thereafter, there has not been any transaction in these shares. During the relevant assessment year the appellant has shown an amount of Rs. 12,80,68,594/- as profit on sale of investment. There is no other income which can be attributed to the transaction in the form of purchase and sale of shares. The financial records of the appellant do not show that it is engaged in

dealing in shares. Therefore, it cannot be said that the appellant has made this transaction for the purpose of its business.

5.5 As the shares dealt in by the appellant company are of its subsidiaries and have been kept for a very long period without showing any signs of business transaction, I hold that the AO is not justified in treating the amount of Rs. 12,80,68,594/- as business income. Accordingly, I direct the AO to treat this amount as income from LTCG.”

13. Aggrieved by the order of CIT(A) in treating income in question as giving rise to LTCG, the Revenue is in appeal before the Tribunal. In the C.O. the assessee has challenged the validity of the initiation of reassessment proceedings under section 148 of the Act on which issue the CIT(A) did not render any decision as he found that the Assessee has succeeded on merits on the point on which the AO made the impugned additions.

14. We have heard the rival submissions. The issue with regard to treatment of gain arising on sale of shares has been a matter of several circulars issued by the CBDT. CBDT issued an office memorandum dated 13.12.2005 laying down guidelines for assessing officers on tests for distinction between shares held as stock-in-trade and shares held as investment vide office memorandum, dated 13.12.2005 [F. No. 149/287/2005-TPL] which are reproduced as under:—

“Circumstances to be considered by the Assessing Officers in determining whether a person is a trader or an investor in stocks:-

(i) Whether the purchase and sale of securities was allied to his usual trade or business/was incidental to it or was an occasional independent activity: it means if it would be an occasional activity it is an unusual transaction and can be treated as investment and not as a business activity.

(ii) Whether, the purchase is made solely with the intention of resale at a profit or for long-term appreciation and/or for earning dividends and interest.: it means if the purchase is for sales only then it would be business activity and if it would be for long term then it would definitely be investment.

(iii) Whether scale of activity is substantial: means scale and quantum of activity is also an important factor;

(iv) Whether transaction was entered into continuously and regularly during the assessment year: this is called recurrence of transactions.

(v) Whether purchases are made out of own funds or borrowings: it may also be helpful because if an investor is making purchases from own funds it would most probably for the investment purpose though, it is not totally certain.

(vi) The stated objects in the Memorandum and Articles of Association in the case of corporate assessee: In case of corporate assessee the object in the memorandum is also an important factor means if it's a stock trading company then the income would be business income.

(vii) Typical holding period for securities bought and sold: holding period is also a guiding factor.

(viii) Ratio of sales to purchase and holding: It again indicates the quantum of transactions.

(ix) The time devoted to the activity and the extent to which it is the means of livelihood: it is a factor for judging as if a normal investor would not devote whole year in buying and selling only.

(x) The characterization of securities in the books of account and balance sheet as stock-in-trade or investment: this is also a self explanatory point

(xi) Whether the securities purchased or sold are listed or unlisted: this will help the assessing officer to a small extent but definitely more listed securities indicates the business activity.

(xii) Whether investment is in sister/related concerns or independent companies: this can be a factor also.

(xiii) Whether transaction is by promoters of the company: this will help in a way to judge whether promoters are investing in the company or not..

(xiv) total number of stock dealt in: it is again quantum

(xv) **whether money has been paid or received or whether these are only book entries**: this is basically for assessing officer to judge the genuineness of transactions.

15. Another Circular being Circular No.4/2007 dated 15/6/2007 was also issued. In the Circulars so issued, the CBDT has emphasised that no single test is conclusive and it is the cumulative effect of all relevant factors which will be taken into consideration in reaching a conclusion as regards the nature of shares and the resultant income arising from their transfer.

16. Learned Counsel for the assessee has brought to our notice circular No.6/2016 dated 29.02.2016 wherein CBDT has emphasized the importance of treatment given in the books of accounts by an Assessee of the shares to ascertain the intention in acquiring shares. In para 3, the CBDT has laid down as follows:

“3. Disputes, however, continue to exist on the application of these principles to the facts of an individual case since the taxpayers find it difficult to prove the intention in acquiring such shares/securities. In this background, while recognizing that no universal principal in absolute terms can be laid down to decide the character of income from sale of shares and securities (Le. whether the same is in the nature of capital gain or business income), CBDT realizing that major part of shares/securities transactions takes place in respect of the listed ones and with a view to reduce litigation and uncertainty in the matter, in partial modification to the aforesaid Circulars, further instructs that the Assessing Officers in holding whether the surplus generated from sale of listed shares or other securities would be treated as Capital Gain or Business Income, shall take into account the following-

a) Where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income,

b) In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by 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;

c) In all other cases, the nature of transaction (i.e. whether the same is in the nature of capital gain or business income) shall continue to be decided keeping in view the aforesaid Circulars issued by the CBDT.”

17. In another circular of the CBDT dated 02.05.2016, the principles laid down in para 3(b) of Circular No.6/2016 has also been extended to unlisted shares and securities. Para 2 of the circular reads as follows:

“2. Similarly, for determining the tax-treatment of income arising from transfer of unlisted shares for which no formal market exists for trading, a need has been felt to have a consistent view in assessments pertaining to such income. It has, accordingly, been decided that the income arising from transfer of unlisted shares would be considered under the head ‘Capital Gain’, irrespective of period of holding, with a view to avoid disputes/litigation and to maintain uniform approach.”

18. It is not in dispute that the shares of M/s. Lee Edges were purchased by the assessee in the Financial Year 2003-04 and those of M/s. Shaw Wallace Breveries Ltd., were purchased in the Financial Year 2001-02 were unlisted shares. These shares were sold in Financial Year 2004-05. These shares were held for more than 12 months in both the cases. The admitted position with regard to treatment in the books of accounts is that the shares have been treated as investment and not as stock-in-trade. In the light of the CBDT’s Circulars referred to above which are in modification of Circular No.4/2007 dated 15.06.2007, we are of the view that the CIT(A) was justified in coming to the conclusion that the gain on sale of shares has to be regarded as LTCG. As already observed, the only reason given by the AO for coming to the conclusion that income on sale of shares has to be regarded as business income is due to the fact that the cost of acquisition of the shares was less and the sale proceeds of those shares were very high and therefore the gain in question should be regarded as income from business. This approach of the AO is contrary to the tests laid down in the several Circulars in particular Circular No.4/2007. In the light of the subsequent Circulars pointed out above, we are of the view that the income on sale of shares has to be regarded as LTCG. We therefore uphold the order of CIT(A). In view of the above conclusion in the appeal of the

Revenue, we are of the view that no adjudication is necessary in so far as the C.O. filed by the assessee is concerned. Accordingly, the same is dismissed.

19. In the result, the appeal as well as the cross objection are dismissed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(B. R. BASKARAN)
Accountant Member

Sd/-

(N. V. VASUDEVAN)
Vice President

Bangalore.

Dated: 05.02.2021.

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Copy to:

1. Appellants	2.	Respondent
3. CIT	4.	CIT(A)
5. DR	6.	Guard file

By order

Assistant Registrar,
ITAT, Bangalore.