

आयकर अपीलीय अधिकरण पुणे न्यायपीठ “बी” पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH “B”, PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.891/PUN/2016

निर्धारण वर्ष / Assessment Year : 2007-08

Ajinkya Electromelt Pvt. Ltd.,
Khandelwal Jain & Associates,
Alankar Cinema Building,
1st Floor, Above United Bank,
Pune – 411001

.... अपीलार्थी/Appellant

PAN: AABCA5142M

Vs.

The Dy. Commissioner of Income Tax,
Circle-8, Pune

.... प्रत्यर्थी / Respondent

Assessee by : Shri R.G. Nahar
Revenue by : Shri M.K. Verma

सुनवाई की तारीख / Date of Hearing : 28.08.2018	घोषणा की तारीख / Date of Pronouncement: 30.08.2018
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by the assessee is against order of CIT(A)-9, Pune, dated 11.03.2016 relating to assessment year 2007-08 against order passed under section 143(3) of the Income Tax Act 1961 (in short the ‘Act’).

2. The assessee has raised the following ground of appeal:-

1. *On facts and circumstances prevailing in the case and as per provisions & scheme of the Act it be held that, the amount of Rs.22,90,531/- considered by the Assessing Officer as assessable under the head 'Income from business' is contrary to the provisions of the Act & facts prevailing in the case. The income of Rs.22,90,531/- should have been assessed under the head capital gain as claimed & declared by the appellant. Just in proper relief be granted to the appellant in this respect.*

3. The issue raised in the present appeal is against assessability of gain arising on sale of shares as 'Income from business' as held by the authorities below or 'Income from short term capital gains', as declared by the assessee.

4. Briefly, in the facts of the case, the assessee was trading in steel products and the total turnover from such activity was ₹ 37.67 crores. The assessee was also investing in shares from year to year and was declaring the said investment in the Balance Sheet under the head 'Investment'. During the year under consideration, the assessee had declared 'Income from long term capital gains' of ₹ 6,43,692/- and 'Income from short term capital gains' on sale of shares at ₹ 22,90,532/-. The plea of assessee before the Assessing Officer and the CIT(A) was that the shares were held as investments and the physical delivery of the said shares was received and given; STT was paid on the said transactions and the income therefrom was offered under the head 'Income from short term capital gains'. The assessee also pointed out that from the same pool of Investment Account, certain transactions gave rise to long term capital gains. The Assessing Officer accepted the income offered under the head 'Income from long term capital gains'. However, in respect of shares sold which were declared as short term capital gains, the Assessing Officer treated the same as 'Income from business'. The reason for non-accepting the claim of assessee was that on identical facts in assessment years 2005-06 and 2006-07, the CIT(A) had

decided the issue against assessee. The Assessing Officer thus, treated the gain of ₹ 22,90,531/- as 'Income from business'.

5. The CIT(A) decided the said issue against assessee following the order of Tribunal in ITA No.1519/PN/2008, relating to assessment year 2005-06, order dated 30.07.2010. The finding of Tribunal in para 13 has been reproduced by the CIT(A).

6. The assessee is in appeal against the order of CIT(A).

7. The learned Authorized Representative for the assessee at the outset pointed out that the appeal of assessee on similar issue was decided, against which the assessee had filed an appeal before the Hon'ble Bombay High Court, which has been admitted in appeal No.104 of 2011, dated 04.01.2012. The learned Authorized Representative for the assessee further pointed out that the assessee was making investment in shares over a long period of time which was declared as such in the Balance Sheet. However, the income declared under the head 'Long term capital gains' was accepted by the Department in assessment year 2005-06 but the gain arising on 'Short term capital gains' was treated as 'Income from business'. He further pointed out that the assessee had placed reliance on the decision of Mumbai Bench of Tribunal in the case of Gopal Purohit reported in 128 TTJ 87 (Mum), which has been confirmed by the Hon'ble Bombay High Court reported in 336 ITR 287 (Bom) and also other decisions which are mentioned in para 8 at page 7 of the order of Tribunal; but while deciding the issue, ratio laid down by the said decisions have not been considered. In this regard, he referred to the recent decision of the Hon'ble Bombay High Court in Writ Petition No.1833 of 2018 in Amore Jewels Pvt. Ltd.

Vs. DCIT, judgment dated 03.08.2018 and pointed out that such non-consideration of the decision of jurisdictional High Court makes the order invalid. Another point which was raised by the learned Authorized Representative for the assessee was that the Department had inconsistent approach in taxing gain arising on sale of shares, wherein the long term capital gains from the same pool of investment was accepted but the short term capital gains arising was treated as 'Income from business'. He made reference to the details of share transactions which were filed before the authorities below, copy of which is placed at pages 43 to 52 of Paper Book and pointed out that some of the shares which were sold by the assessee were purchased in the preceding year and were declared as investment by the assessee. He pointed out that out of total short term capital gains of ₹ 22,90,531/-, major gain was on sale of shares of Hindustan Zinc Ltd., which were purchased in the month of October, 2005 for total consideration of ₹ 5,39,449/- and were sold on 11.05.2006 for sum of ₹ 24,63,168/-, resulting in gain of ₹ 19,23,718/-. He also referred to other shares similarly shown as investment in the preceding year, which were sold during the year. Another aspect pointed out by the learned Authorized Representative for the assessee was that even the CBDT has recognized different approach/s of the Department and vide Circular dated 29.02.2016 has clarified that pragmatic view should be taken on the issue and where the assessee has declared the same as capital gains, the same may not be disturbed. He pointed out that when the Tribunal had decided the matter relating to assessment year 2005-06, the said Circular was not available. He also pointed out that the issue is also covered by the decision of jurisdictional High Court in the appeal filed by the Revenue in the case of CIT Vs. Gopal Purohit (supra), wherein SLP has been dismissed by the Apex Court. He again pointed out that the Tribunal while deciding the issue

though referred to the argument of assessee vis-à-vis case of CIT Vs. Gopal Purohit (supra) but no discussion has been made on the said ratio. He stressed that the decision of the Tribunal in such circumstances requires re-consideration. The learned Authorized Representative for the assessee also filed written note mentioning that various decisions of Pune Bench have decided the issue consequent to the CBDT Circular.

8. The learned Departmental Representative for the Revenue on the other hand, pointed out that facts in present appeal are similar to the facts in assessment year 2005-06, wherein the Tribunal has already taken a decision and thus, he heavily relied on the same.

9. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is in respect of assessability of gain arising on sale of shares. The assessee is majorly involved in trading in steel products. However, certain funds available with the assessee were also invested in shares. The assessee has declared such investments in the Balance Sheet under the Schedule No.4 under the head 'Investment' which comprised of two parts i.e. non-quoted investment of about ₹ 1.32 crores and quoted investment of ₹ 4.91 crores. It may also be pointed out that the total turnover of assessee from the business activity for the year under consideration was about ₹ 48.63 crores and also other receipts of about ₹ 72 lakhs. The assessee company has shown profit before taxation at ₹ 4.85 crores; copy of the Balance Sheet, Profit and Loss Account and schedules are placed at pages 25-A to 31 of Paper Book. The assessee has also placed on record the detailed break-up of sale of shares scrip-wise for the year under consideration and has also pointed out that whether the gain is short term capital gain or long term capital gain. The perusal of the said

details shows that certain shares which have been sold during the year and the gain arising from which is short term capital gain were acquired in the preceding year. The perusal of detailed list reflects the following investments being made in the earlier year:-

a)	Bank of Maharashtra	-	Gain of ₹ 13,658/-
b)	Electrosteel Castings India	-	Gain of ₹ 7,316/-
c)	Finolex Industries Ltd.	-	Gain of ₹ 5,337/-
d)	Hindustan Zinc Ltd.	-	Gain of ₹ 19,23,718/-
e)	Jaysynth Dyes Ltd.	-	Gain of ₹ 13,878/-
f)	Karuna Cable	-	Gain of ₹ 5,431/-
g)	Tata Sponge Ltd.	-	Loss of ₹ 20,463/-

10. In addition, the assessee has also acquired and sold certain shares during the year itself, against which short term capital gains has been declared. However, out of total gain of about ₹ 23 lakhs, gain of ₹ 19.23 lakhs is from one scrip i.e. Hindustan Zinc Ltd. acquired by the assessee in the preceding year. The perusal of the list of investments of quoted shares reflect the said investments being brought forward from the preceding year at ₹ 5,39,449/- and closing balance as on 31.03.2007 is Nil. The investments shown by the assessee in its Balance Sheet have been accepted as such by the Department and the position has not been disturbed. It may be pointed out that the Tribunal in assessment year 2005-06 had taken a stand against the assessee in assessing income from short term capital gains under the head 'Income from business'. If that be the position, the Assessing Officer while completing assessment for the year under consideration should have also considered the

declaration of assessee under the head 'Investment' in its Balance Sheet; but the same has not been disturbed by the Assessing Officer.

11. Another aspect which needs to be kept in mind is the Circular No.6/2016 issued by the CBDT on 29.02.2016. The CBDT took note of the Courts having laid down different parameters to distinguish the shares held as investment from the shares held as stock-in-trade. It also took note of the disputes which continue to exist on the application of said principles, since the tax payers found difficulty to prove the intention in acquiring the shares / securities. In this background, the CBDT in order to decide the character of income from sale of shares and securities i.e. whether the same was capital gain or business income and in order to reduce litigation and uncertainty in the matter, further instructed 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.*

12. Various Benches of Tribunal thereafter have decided the issue of assessability of gain arising on sale of shares following the said principles. It

may also be pointed out that the jurisdictional High Court in the case of CIT Vs.

Gopal Purohit (supra) had also decided similar issue and held as under:-

“2. The Tribunal has entered a pure finding of fact that the assessee was engaged in two different types of transactions. The first set of transactions involved investment in shares. The second set of transactions involved dealing in shares for the purposes of business (described in paragraph 8.3 of the judgment of the Tribunal as transactions purely of jobbing without delivery). The Tribunal has correctly applied the principle of law in accepting the position that it is open to an assessee to maintain two separate port folios, one relating to investment in shares and another relating to business activities involving dealing in shares. The Tribunal held that the delivery based transactions in the present case, should be treated as those in the nature of investment transactions and the profit received there from should be treated either as short term or, as the case may be, long term capital gain, depending upon the period of the holding. A finding of fact has been arrived at by the Tribunal as regards the existence of two distinct types of transactions namely, those by way of investment on one hand and those for the purposes of business on the other hand. Question (a) above, does not raise any substantial question of law.”

13. The SLP filed by the Revenue has been dismissed by the Hon'ble Supreme Court vide judgment dated 15.11.2010.

14. In the entirety of the above said developments in law and also recognition of disputes by the CBDT and the consequent Circular passed by it on 29.02.2016, there is a need to re-look at the decision of the Tribunal which has been passed in assessee's own case in assessment year 2005-06. Before we take re-look at the said decision, it may be pointed out that the assessee was maintaining one pool of investments and the gain arising under the head 'Long term capital gains' had been accepted *per se* and had not been disturbed in any of the years. It is only the gain which has been declared under the head 'Income from short term capital gains' which was disturbed in assessment year 2005-06 and following the earlier order, in assessment year 2007-08 i.e. in the instant assessment year before us. Once the CBDT recognizes litigation arising because of non-consistent stand being taken by the Revenue authorities and guidelines have been issued though in 2016 but such guidelines are to be

applied while deciding the issues which are pending. In such circumstances, the CIT(A) while deciding the appeal on 11.03.2016 should have considered the guidelines atleast. In view of the guidelines and the dispute being settled by the jurisdictional High Court and various Benches of Tribunal, where the assessee was showing its pool of shares as investment in its hands and making declaration in this regard in the Balance Sheet from year to year, such position should not be disturbed. Even the CBDT has guided Officers that the position shall not be put to dispute by the Assessing Officer. It further goes on to state that once the stand has been taken by the assessee in a particular assessment year, then the same shall remain applicable in subsequent assessment years also.

15. The assessee before us has consistently taken a stand and the stand of assessee was partially accepted, wherein the income from long term capital gains has been assessed as such. In respect of short term capital gains arising during the year, as pointed out in the paras hereinabove, major portion of gain is on account of sale of one scrip i.e. Hindustan Zinc Ltd. which were acquired in the preceding year, was declared as investment in the preceding year and was not disturbed by the Assessing Officer and hence, in such circumstances, income declared by the assessee under the head 'Income from short term capital gains' merits to be accepted as such. Accordingly, we find no merit in the orders of authorities below and the same are reversed.

16. One another aspect which needs to be kept in mind is the guiding force of the jurisdictional High Court. The assessee in assessment year 2005-06 before the Tribunal had referred to the decision of the jurisdictional High Court in the case of Gopal Purohit (supra) and pointed out that the factual aspects were same, which has been so noted by the Tribunal in para 8. However, while

deciding the issue the Tribunal has failed to take cognizance of the said decision, which is binding on the Tribunal. Such non-consideration of binding decision makes the decision of Tribunal to be non-speaking order, as held by the jurisdictional High Court in Amore Jewels Pvt. Ltd. Vs. DCIT (supra). Accordingly, we reverse the order of CIT(A) and direct the Assessing Officer to assess the gain arising from sale of shares as short term capital gains. The ground of appeal raised by the assessee is thus, allowed.

17. In the result, appeal of assessee is allowed.

Order pronounced on this 30th day of August, 2018.

Sd/-
(ANIL CHATURVEDI)
लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 30th August, 2018.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-9, Pune;
4. The Pr.CIT-5, Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune