

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA**

**Before Shri A.T.Varkey, Judicial Member and
Shri Waseem Ahmed, Accountant Member**

**ITA No.1213/Kol/2016
Assessment Year :2005-06**

Surya Prakash Toshniwal HUF, C/o. Narendra Goyal & Co., 16, N.S. Road, 2 nd , Floor, Kolkata-700 001 [PAN No.AAGHS 7032 G]	V/s.	Income Tax Officer, Ward-41(3), 3, Government Place, Kolkata-7001
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर स/By Appellant	Shri Subash Agarwal, Advocate
प्रत्यर्थी की ओर स/By Respondent	Shri Pinaki Mukherjee, JCIT-SR-DR
सुनवाई की तारीख/Date of Hearing	06-12-2016
घोषणा की तारीख/Date of Pronouncement	11-01-2017

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is arising out of order of Commissioner of Income Tax (Appeals)-13, Kolkata in appeal No.435/CIT(A)-13/W-44(3)/Kol/2014-15 dated 29.02.2016. Assessment was framed by ITO Ward-41(2), Kolkata u/s 263/143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 28.12.2010 for assessment year 2005-06.

Shri Subash Agarwal, Ld. Advocate appeared on behalf of assessee and Shri Pinaki Mukherjee, Ld. Departmental Representative appeared on behalf of Revenue.

2. First issue raised by assessee in this appeal is that Ld. CIT(A) erred in confirming the order of Assessing Officer by holding that the purchase-sale of securities is a business profit.

3. Briefly, the facts are that the assessee in the present case is a Hindu Un-divided Family (HUF) and derived his income from trading in shares and securities. The assessee is engaged in sales-purchase of securities and earned income thereon was offered to tax under the head "capital gains". However, AO treated the income from the sale-purchase of securities as "business income" on account of following reasons:-

- i) The dividend income in the year under consideration is negligible;
- ii) Frequency for sale-purchase and magnitude of transactions reflects activities of assessee as in the nature of business;
- iii) The manner in which transactions for sale-purchase was recorded in the books of account was sufficient to justify the same as business transactions.

Finally, AO treated the activity of assessee as "business" and accordingly taxed the profit under the head "business income"

4. Aggrieved, assessee preferred an appeal before Ld. CIT(A) whereas it was submitted that assessee being "Karta" of HUF had no knowledge of share market. So the assessee being HUF cannot do business in shares. The assessee has consistently been offering the said income under the "capital gains" irrespective of the fact whether there is gain or loss. The assessee has shown all its securities under the head "Investment" and it has never shown its share under the head as "closing stock". After considering the submissions of assessee Ld. CIT(A) disregarded the claim of assessee by observing as under:-

"The ground of appeal number 01 & 02 relates to tracing capital gain as business income in this regard it is pertinent to mention here that as per findings of the AO, the AO has never treated income of shares transactions as a business income rather than it has been treated as a income from undisclosed sources. Hence, the ground number 01 & 02 are not as per finding of the AO.

In the submission dated 15-02-2016 the appellant has taken ground of assessing the capital gain income as a business income. As these submission are not relevant with the findings of the AO because the AO has not treated it as business income. He has treated it as income from undisclosed sources which are being assessed under section 68. But these submission are made treating it assessed as business income, has no bearing over the findings of the AO who has assessed it as unexplained cash credit u/s 68, and it is miss conceived by the appellant. Hence, these grounds are irrelevant. Therefore the ground number 01 & 02 are hereby dismissed."

Being aggrieved by this, assessee has come up an appeal before us.

5. Before us Ld. AR for the assessee filed paper book which is running pages from 1 to 29 and reiterated same submissions as made before Ld. CIT(A). He further submitted that volume and frequency of shares transactions cannot be basis of forming the opinion that assessee is into the business of sale/ purchase of shares.

On the other hand, Ld. DR for the Revenue vehemently relied on the order of Authorities Below.

6. We have gone through the submissions made by both the sides and order of the lower authorities as well as judgments relied upon before us. In the present case the assessee has shown income from the sale purchase of the shares under the head capital gain but the AO treated the same as income from the business on account of the following reasons :

1. The amount of dividend earned by the assessee in the last 3 years including the year under consideration was negligible and on the contrary the income from the sale purchase of shares was substantial comparatively.
2. The magnitude, frequency of transaction and the period of holding of the securities justify the activities of the assessee in the nature of trade. Accordingly the activity of the assessee cannot be treated as in the nature of investment activity.

However the learned CIT(A) dismissed the appeal of the assessee by confirming the order of AO by holding that the issue raised by the assessee is not arising out of the order of AO. At the outset we find that the learned CIT(A)

has misunderstood the facts of case of the assessee as evident from the order of lower authorities. The issue raised by the assessee is very much arising out of the order of AO. On perusal of assessment order there was no issue for treating the income from share trading business as income from other sources as observed by the learned CIT(A). So we find that the learned CIT(A) has not adjudicated the issue raised by the assessee in the proper manner. However we find that the issue raised by the assessee is well settled. Therefore we are not inclined to restore the issue to learned CIT(A) for fresh adjudication to avoid further litigation. Hence we decided to proceed to dispose off the ground raised by the assessee before us. On perusal of final accounts of the assessee, for the assessment year under consideration and immediately preceding assessment year 2004-05 which are placed on pages 3 to 8 of the paper book, we find that the assessee has been showing all the securities as investment in its books of accounts. The corresponding income on sale and purchase of securities has been offered under the head of capital gain by the assessee for both the years. The AO has merely treated the transaction of sale purchase of securities as an adventure in the nature of trade merely on the ground of magnitude and frequency of the transaction. The securities in the books of accounts maintained by the assessee were classified as investment. Thus in our considered view the AO cannot step into the shoes of the assessee to decide the business decisions for purchase and sale of securities. It is the discretion of the assessee to carry out the activity to the best of his wisdom. Therefore we do not find any substance in the case before us. In this regard, we find the co-ordinate bench of Mumbai Tribunal had an occasion to consider the same in the case of Janak S. Rangawalla vs ACIT reported in (2007) 11 SOT 627 (Mum), wherein it was held that :

"It is the intention of the assessee which is to be seen to determine the nature of transaction conducted by the assessee. Though the investment in shares is on a large magnitude but the same shall not decide the nature of transaction. Similar transactions of sale and purchase of shares in the preceding years have been held to be income from capital gains both on long term and short term basis. The transaction in the year under consideration on account of sale and purchase of shares is same as in the preceding years and the same

merits to be accepted as short term capital gains. There is no basis for treating the assessee as a trader in shares, when his intention to hold the shares in Indian companies as an investment and not as stock in trade. The mere magnitude of the transaction does not change the nature of transaction, which are being assessed as income from capital gains in the past several years. The Assessing officer is directed to set off the Long Term Capital Loss against the Short Term Capital Gain of the year under consideration. The grounds of appeal raised by the assessee are allowed."

We also find that the Hon'ble Calcutta High Court in the case of CIT vs Merlin Holding P Ltd reported in (2015) 375 ITR 118 (Cal) for the Asst Years 2005-06 and 2006-07 had held as below:-

"The frequency of transactions in shares alone cannot show that the intention of the investor was not to make an investment. The Legislature has not made any distinction on the basis-of frequency of transactions. The benefit of short - term capital gains can be availed of for any period of retention of shares up to 12 months. Although a ceiling has been provided, there is no indication as regards the floor, which can be as little as one day. The question essentially is a question of fact. The assessee was a certified non-banking financial concern. Its main activities were giving loans and taking loans and-investing in shares and securities. The Assessing Officer, for the assessment years 2005-06 and 2006-07, opined that the activity which, according to the assessee, was on investment account amounted to business activity and, therefore, he treated the short- term capital gains of Rs. 1,01,00,000 as business income. The Commissioner (Appeals) held that the refusal on the part of the Assessing Officer to accept the short-term capital gains was incorrect. This was confirmed by the Tribunal. On appeal :

Held, dismissing the appeal, that the assessee had adduced proof to show that some transactions were intended to be business transactions, some transactions were intended to be by way of investment and some transactions were by way of speculation. The Revenue had not been able to find fault from the evidence adduced. The mere fact that there were 1,000 transactions in a year or the mere fact that the majority of the income was from the share dealing or that the managing director of the assessee was also a managing director of a firm of share brokers could not have any decisive value. The Commissioner (Appeals) and the Tribunal had concurrently held against the views of the Assessing Officer. On the basis of the submissions made on behalf of the Revenue, it was not possible to say that the view entertained by the Commissioner (Appeals) or the Tribunal was not a possible view. Therefore, the decision of the Tribunal could not be said to be perverse. No fruitful purpose was likely to be served by remanding the matter."

For the aforesaid reasons, we are of the opinion that the income shown by the assessee under the head of capital gain is consistent with the accounting

treatment made in the books of accounts. Respectfully relying on the aforesaid judgments we allow the ground of appeal of the assessee.

7. Next issue raised by assessee in this appeal is that Ld. CIT(A) erred in confirming the order of AO by sustaining the addition of Rs.14,97,500/- by treating the same as income from undisclosed source.

8. The assessee had purchased 5000 shares of M/s Rohon Financial and Securities Ltd. (RFSL for short) at a cost of Rs.50,250/- in aggregate on 26.12.2003. The same shares were sold to M/s Ahilya Commercial Pvt. Ltd. (ACPL for short) by assessee for Rs.14.97 lakhs on 14.01.2005 resulting capital gain of Rs.14,46,750/-. The AO, during the course of assessment proceedings observed that there was a sharp rise in price of shares of RFSL and accordingly the AO verified the transactions from the on-line portal of SEBI which revealed that ACPL was directed by SEBI not to buy, sale or deal in securities in any manner either directly or indirectly. It was also observed that ACPL has not filed financial statement before SEBI for the year ended on 31.03.2005. In view of the above, AO held that the transactions as bogus and accordingly he treated the same as income of assessee from undisclosed source.

9. Aggrieved, assessee preferred an appeal before Ld. CIT(A) whereas assessee submitted that the transactions for sale-purchase of share with RFSL was made through account payee cheques. The shares were sold after 13 months through on-line portal of Kolkata Stock Exchange without knowing details of buyer. Those transactions of purchase-sale are supported with the valid contract notes. The assessee further submitted that it cannot be penalized for non-filing of financial statement by ACPL. However Ld. CIT(A) after considering assessee's submission has disregarded the claim of assessee and upheld the order of AO by observing as under:-

“... In this regard it is pertinent to mention here that the appellant Sri Surya Prakash Toshniwal (HUF) is run by Sri Surya Prakash Toshniwal broker and Sri Surya Prakash Toshniwal is Karta of the HUF therefore, the case law cited by him is not applicable as the facts of the case are different. In this case buying and selling both activity has been operated by Sri Surya Prakash

Toshniwal. The identity of M/s Ahilya Commercial Pvt. Ltd. was not proved. The creditworthiness of the buyer was not established, even net worth of the share's company was not established. It was the duty of the appellant to discharge his onus as the credit was made in his books of account but he failed to do so. Net worth of buying and selling company was also not substantiated to the extent of price raised, and worth at which it was purchased. In this case the buying and selling was done by the same person in his favour under different cover of status but the beneficiary was ultimately same. The beneficiary has to discharge its primary onus for any transaction made in his books of account. The AO has very categorically given the finding based on inquiry of SEBI and non-discharging of onus by the appellant. Even at appeal stage the facts brought on record by the AO were not controverted by any material facts. In view of the aforesaid observation of the AO and as stated above about the observation of SEBI and investment of same person as karta of HUF being seller and as a broker being buyer from M/s Rohan International, I agree with the addition made by the AO is upheld and the appeal is dismissed on this ground."

Being aggrieved by this, assessee has come up an appeal before us.

10. Before us Ld. AR for the assessee reiterated same submissions as made before Ld. CIT(A) and further stated that the shares were sold after the payment of security transactions tax and shares were sold at a price which was listed on the Stock Exchange.

On the other hand, Ld. DR for the Revenue vehemently relied on the order of Authorities Below.

11. We have heard the rival contentions and perused the materials available on record. In the present case the assessee has shown income from long term capital gain for Rs.14,46,529.00 which was claimed as exempted income under section 10(38) of the Act. However, the assessing officer treated the same as income from other sources by holding such income as bogus and from undisclosed sources which was routed in the guise of long term capital gain. The addition made by the AO was also upheld by the learned CIT(A). Now the issues before us arises for our adjudication so as to whether the long term capital gain income claimed by the assessee is bogus income in the aforesaid facts and circumstances. In the case on hand admittedly the shares were sold by the assessee after paying the Security Transaction Tax (STT). Similarly the purchase price of the shares and the sale

price of the shares were reflecting on the Calcutta stock exchange as evident from page number 19 and 20 of the paper book. It is also not in dispute that the purchase and sale of the shares were routed through account payee cheques. The learned AR in support of his claim has also produced the contract notes for the purchase and sale of the shares which are placed on pages 12 and 13 of the paper book. However we find that in spite of having all the aforesaid information the lower authorities have held the long term capital gain as bogus and from undisclosed sources on the basis of certain facts as revealed under :

1. The assessee in the present case is a HUF and the transaction was routed for both purchase and sale of the shares through an individual broker who happened to be the Karta of assessee i.e. HUF.
2. The shares were sold to M/s Ahilaya Commercial Private Limited (for short ACPL) but the financial statements of the company were not filed to the stock exchange. The assessee also failed to furnish the necessary details of ACPL to establish the genuineness of the transactions except that the transactions were routed through account payee cheques.
3. The SEBI has also directed to M/s ACPL not to carry out any transaction of purchase and sale of securities in any manner either directly or indirectly.
4. The assessee has also failed to submit the net worth of M/s RFL and ACPL to justify the amount of capital gain earned during the year.

On the analysis of the above facts we find that the lower authorities have not brought on record any concrete evidence for disallowing the long term capital gain of the assessee. The AO should have issued notices and summons to M/s RFL and ACPL under section 133(6) and 131 of the Act for the production of the necessary financial information before rejecting the claim of the assessee. We find that all the necessary information which were available with the assessee had been brought on record by the assessee before the lower authorities. In case ACPL has not filed the financial statements with the stock

exchange then the assessee for the fault of ACPL cannot be held guilty under the income tax proceedings. The assessee in the instant case has made the transactions for the sale and purchase of the shares through a valid stock broker who was in existence at the relevant time with the stock exchange and this fact has not been doubted by the lower authorities. In view of the above we hold that the lower authorities had not brought on record sufficient reasons for disallowing the claim of the assessee. In this connection we rely in the case of CIT versus Carbo Industrial Holdings Limited reported in 116taxman159 where the Hon'ble jurisdictional High Court has held as under :

"If the share broker, even after issue of summons does not appear, for that reason, the claim of the assessee should not be denied, specially in the cases when the existence of broker is not in dispute, nor the payment is in dispute. Merely because some broker failed to appear, assessee should not be punished for the default of a broker and on mere suspicion the claim of assessee should not be denied."

Similarly we also find guidance and support from the judgment of Hon'ble jurisdictional High Court in the case of CIT Vs. Emerald Commercial Ltd. reported in 120 taxman 282 whereby it was observed as under :

"Business income—Business loss—Loss on sale of shares—Details of purchase and sale of shares furnished—Payment and receipts were through account payee cheque—Identity of seller and purchaser not disputed—Claim for loss could not be disallowed on the mere ground that the assessee failed to produce the brokers for verification of the transaction—Finding of the Tribunal that the loss incurred by the assessee in the share dealings is genuine and is allowable was based on material and was not perverse—CIT vs. Carbo Industrial Holdings Ltd. (2000) 161 CTR (Cal) 282 : (2000) 244 ITR 422 (Cal) followed"

Respectfully following the aforesaid judgments we find that the proposition laid down by the Hon'ble Courts are applicable to the instant case on hand. The addition was made by the lower authorities on several grounds as discussed above but on analysis of the facts we find that there was no fault on the part of the assessee. Therefore we are inclined to reverse the order of lower authorities. Hence this ground of appeal of the assessee is allowed.

12. Last issue raised by assessee in this appeal is that Ld. CIT(A) erred in confirming the order of AO by disallowing the dividend income for Rs.24,983/- from UTI master value fund wherein the amount of Rs.75,000/- was invested.

13. The AO observed that such investment was not reflecting in the previous year's balance-sheet ending on 31.03.2004. Therefore, the investment was made during the year. Accordingly, AO was of the view that period of holding of the investment is less than a year and in such short span of time, the dividend income cannot be earned by assessee. Thus, AO treated the dividend income as income from undisclosed source.

14. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who upheld the order of AO by observing as under:-

"Ground number 03 relates to the disallowance of divided of Rs.24983/- . The AO has disallowed the same on the ground that no such investment is seen to be made. During the aforesaid period in the balance sheet and the appellant claim dividend income of Rs.24983/- from UTI master value fund of Rs.75000/- . The AO further concluded that this cannot be possible as per the prevailing rate of dividend allowed by the UTI concerned. It was further observed by the AO that investment made during the financial year 2004-05 will make appellant eligible to earn dividend only at completion of one year that could be financial year 2004-05 and considering the aforesaid fact the AO added the same under section 68 as from undisclosed sources."

The perusal of bank account submitted at appellate stage by the appellant shows that some payment is made on 07-02-2005 and some receipt is also shown to be received on 07-02-2005 which cannot be true in any case. No certificate of mutual fund has been submitted. The above payment detail though not accepted but for sake of argument, if it is presumed that the same pertains for payment mutual funds than it cannot be case in any situation that on the same date appellant will received dividend of Rs25000/- . Considering the above fat the action made by the AO is hereby confirmed and the appeal is dismissed."

Being aggrieved by this, assessee has come up an appeal before us.

15. At the outset, we find that assessee has made investment on 07.02.2005 for Rs.75,000/- and on same day the dividend income was received from UTI as evident from the account statement which is placed on page 22 of the paper book. We also find that the same amount of dividend is also reflecting in the bank statement of assessee which is placed on page 23

of the paper book and said amount was credited in the bank of assessee on 19.02.2005 through account payee cheque. To this point, Ld. DR for the Revenue has not brought anything on record to contradict the argument made by Ld. AR. Considering the facts and circumstances of the case, we reverse the order of Ld. CIT(A) and this ground of assessee is allowed.

16. In the result, assessee's appeal stands allowed.

Order pronounced in the open court 11/01/2017

Sd/- (न्यायिक सदस्य) (A.T.Varkey) (Judicial Member) Kolkata,	Sd/- (लाला सदस्य) (Waseem Ahmed) (Accountant Member)
--	---

*Dkp, Sr.P.S

दिनांक:- 11/01/2017 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Surya Prakash Toshniwal, HUF, C/o. Narendra Goyal & Co., 16 N.S. Road, 2nd Floor, Kolkata-700 001
2. प्रत्यर्थी/Respondent-ITO Ward-41(3),3, Govt. Place, Kolkata-700 001
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश सम्
/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।