

**INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "A": NEW DELHI]**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
A N D
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)**

ITA. No. 5526/Del/2018
(Assessment Year: 2015-16)

Shri Amit Kumar Dey, C/o. Kapil Goel, Adv. ; F - 26/124, Sector : 7, Rohini, Delhi - 110 085. PAN: ACMPD6755H	Vs.	DCIT, Circle : 1 (1) Gurgaon.
(Appellant)		(Respondent)

Assessee by :	Shri Kapil Goel, Adv. ;
Revenue by:	Shri Ajay Kumar, Sr. DR;
Date of Hearing :	15/03/2021
Date of pronouncement :	30/03/2021

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the assessee against the order of the ld. Commissioner of Income Tax (Appeals)-I, Gurgaon, [The ld CIT (A)] dated 28.06.2018, for assessment year 2015-16 raising two grounds of appeal as under:-

“ 1. That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in making re-characterization of the income from capital gains to business head qua subject share sale transaction firstly without any adequate and corresponding show cause notice of enhancement, secondly on extant facts said enhancement could not have been done as per dear proscription under the statute and thirdly only limited scrutiny proceedings was going on before Ld AO as per notice u/s 143(2) dated 20/09/2016 on issue of “deduction claimed under the head capital gains” which was never converted to complete scrutiny as per extant CBDT instructions and fourthly said re-characterization on its merits also is misdirected and clearly against the principle of consistency and CBDT circulars which covers the issue in favor of appellant on its merits.

Therefore returned income may please be restored.

2. That on the facts and in the circumstances of the case and in law, Id CIT-A grossly erred in making re-characterization of the income from capital gains to business head qua subject share sale transaction and making resultant enhanced addition of Rs 440,165/- without any authority and warrant of law and acting intotally perfunctory manner as manifest from purely wishful thinking expressed in para 3.19 of impugned order which is seriously contested to be factually and legally incorrect. “

2. Brief facts of the case shows that assessee received salary income and income from other sources. He filed return of income on 31.08.2015 for Rs.1,28,09,820/-. The case of the assessee was selected for limited scrutiny as per notice dated 20th September 2016 for examination of deduction claimed under the head capital gains. During the year assessee has claimed deduction under Section 54 of the Income Tax Act, 1961 (the Act) of Rs.60,10,487/- on profit on sale of fixed assets.
3. As the assessment proceedings continued, the Id. Assessing Officer noted that the assessee had set off the short term capital loss earned on the sale of two scripits , namely, Tech Mahindra Ltd and Infosys Ltd with the short term capital gain on sale of the other securities such as mutual funds etc. The Id. AO noted that assessee has purchased these scripits with cum-bonus and sold ex-bonus and, therefore, has notionally de-valued the same as assessee has received the bonus shares having the 'NIL' value as cost. Therefore, the loss amounting to Rs. 7,61,581/- claimed by the assessee against the profit from other transactions of sale of securities was disallowed. Accordingly, the total income of the assessee was assessed at Rs. 1,35,71,401/- against the returned income of Rs. 1,28,09,820/- by the order under Section 143(3) of the Act dated 21.09.2017.
4. Assessee aggrieved with the above order, preferred appeal before the Id. CIT (Appeals). The Id. CIT (Appeals) held that the transactions of purchase and sale of Tech Mahindra and Infosys ltd is chargeable to tax under the head business income and not capital gain. Therefore, he issued a show cause notice that why the income of the assessee may not be enhanced accordingly. According to the CIT (Appeals), assessee has earned business profit of Rs. 3,14,789/- on sale of 300 shares of Infosys and a profit of Rs. 1,25,336/- on sale of 225 shares of Tech Mahindra. The assessee objected and stated that the income from sale of those shares is chargeable to tax under the head capital gains in view of various Circulars of the CBDT. It

further stated that in fact assessee has incurred loss on sale of shares. The ld. CIT (Appeals) rejected the contentions of the assessee. He prepared trading account of both the scripts and determined profit by valuing closing stock of each script. He thus, enhanced the income of the assessee holding that the profit of Rs. 3,14,789/- and Rs. 1,25,376/- in the shares of Infosys Ltd. and Tech Mahindra Ltd. are chargeable to tax as business income. Thus, he dismissed the appeal and enhanced the income.

5. The ld. AR raised first ground of appeal that when the case of the assessee was selected under the limited scrutiny criteria, without converting same into complete scrutiny, the ld. Assessing Officer as well as the ld. CIT (Appeals) could not have gone on making additions and adjustments on issues other than issues of limited scrutiny. He submitted that there is a procedure laid down for the same. He referred to various instructions and circulars on this point. He also stressed the argument by placing reliance on several decisions.
6. On the merits of the issue he also raised several arguments contesting that the addition made by the Assessing Officer by disallowing the loss, enhancement by the ld. CIT (Appeals), characterizing the capital gains into business income by the CIT (Appeals) are all devoid of merit.
7. The ld. DR relied upon the orders of the lower authorities.
8. On a query from the bench, that whether the case of the assessee was converted into complete scrutiny from the limited scrutiny, the answer was categorically 'No'. The assessment order as well as the appellate order also did not show that any such exercise was carried out. Instead of that, the notices issued during the years of assessment proceedings emphatically shows that the case was of limited scrutiny for verification of deduction under the head capital gains claimed by the assessee.
9. We have carefully considered the rival contentions and perused the orders of the lower authorities. Admittedly, in the return of income assessee has claimed the deduction of Rs. 60,10,487/- under Section 54 of the Act. This is evident from the computation of total income placed at page No. 3 of the paper book. The notice under Section 143(2) of the Act dated 20.09.2016 title 'limited scrutiny' categorically states that the issue of deduction claimed under the head capital gains have been identified for examination. Admittedly, no such adjustment to the returned income of the assessee was

made with respect to deduction claimed by the assessee under the head capital gain. Admittedly, such deduction was allowed to the assessee. Therefore, it is apparent that the reasons for selection of the limited scrutiny was for verifying the deduction claimed Under the head capital gain by the assessee which was examined by the learned assessing officer and he was satisfied and thus allowed the claim. However, the learned assessing officer found that there are shares of two companies, which are purchased by the assessee, bonus was declared on them, and assessee sold part of the shares and has resultantly shown capital loss on those transactions. Such losses were set off against the capital gain earned by the assessee in mutual funds and other securities. Admittedly, this was not the issue of limited scrutiny before the assessing officer. Therefore now the facts before us shows that assessing officer has made an adjustment to the total income of the assessee on the issue which was not part of the limited scrutiny issue for which the case of the assessee was picked up for scrutiny. There is no evidence placed before us that such a limited scrutiny assessment proceedings have been converted into complete scrutiny proceedings. The assessment order as well as the orders of the learned and CIT – A also does not show any indication of the same. If the Assessing Officer desires to look into any other adjustment or examination of any issue, then what is mentioned as reasons for limited scrutiny, the CBDT has issued a clear instruction No. 5 of 2016 dated 14.07.2016 wherein after obtaining the administrative approval from the Pr. Commissioner of Income Tax or CIT, as the case may be, he can embark upon other issues by converting it into a ‘complete scrutiny’ case from ‘limited scrutiny’ case. In the present case, no such exercise has been shown to us. Further, the above instruction clearly shows that only after conversion of case to complete scrutiny and after following the detailed procedure contained therein, the Assessing Officer may examine the issues other than limited scrutiny issue. The AO is also required to intimate the assessee regarding such conversion of case into complete scrutiny. In the present case, it is apparent that the ld. AO has touched upon the issues, which are not part of the limited scrutiny. Therefore, the same deserves to be deleted on this account only. In view of this, we direct the ld. Assessing Officer to delete the disallowance of set off of capital loss of Rs. 7,61,581/-.

10. Now we come to the issue of the enhancement made by the CIT (Appeals). Firstly, on perusal of the above facts, we hold that when the case of the assessee was selected for limited scrutiny, the Id. CIT (Appeals) can make enhancement only with the aspect of issues that were part of the limited scrutiny. Otherwise, it may happen that the Id. Assessing Officer may pass an order on the issues related to limited scrutiny and the Id. CIT (Appeals) may enhance the income of the assessee on issues other than limited scrutiny issues. This will amount to bypassing the above quoted instructions of the CBDT. It also shows that if that happens then without obtaining the approval of Commissioner of Income Tax and CCIT, the whole assessment of the assessee remains open, despite the fact that the learned assessing officer has looked into the issues contained in the limited scrutiny notice. We do not find such an intention of the CBDT in issuing the instructions of limited scrutiny case. On this score, we do not approve the enhancement made by the Id. CIT (Appeals) on issues, which were not part of limited scrutiny.
11. Even on the merits of the case the facts clearly shows that assessee has purchased 575 shares of Infosys Ltd. against which he has received 575 bonus shares. The purchase cost of 575 shares were Rs. 12,90,553/-. Out of the above assessee sold 300 shares for Rs. 6,51,455/- only. Similarly in the case of Tech Mahindra Ltd. assessee purchased 225 shares for Rs. 4,33,684/-. Assessee received 300 bonus shares. Out of the above assessee sold 225 shares for Rs. 3,11,201/-. Assessee disclosed short-term capital loss and sale of those shares. The Id. CIT (Appeals) held that the same is chargeable to tax as business income. He computed profit of Rs. 3,14,789/- in the case of shares of Infosys Ltd. and Rs. 1,25,336/- for shares of Tech Mahindra Ltd. He drew a profit and loss account of the above transactions, displayed at page Nos. 12 and 13 of his order. The above transactions, if examined, based on CBDT Circular dated 13.12.2005, it is apparent that the assessee is an investor in the share and not a trader. The purchase and sale of the above isolated securities were not at all related to the business of assessee or show any trade activity. The transactions in the shares were merely an occasional independent activity. The scale of the activity is also not substantial, looking at the income offered by the assessee in the return of income at Rs. 1,28,09,820/-. The transactions were also

not regular basis and the purchases are not shown to have been made out of borrowings. In view of this, we do not find any merit in the findings of the Id. CIT (Appeals) that the above transactions are chargeable to tax under the head business income. In view of this fact, the enhancement of income made by the Id. CIT (Appeals) deserves to be deleted and hence deleted.

12. Accordingly, ground Nos. 1 and 2 of the appeal of the assessee are allowed.
13. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on : 30 /03/2021.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated : 30 /03/2021.

MEHTA

Copy forwarded to :

1. Appellant;
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	30.03.2021
Date on which the typed draft is placed before the dictating member	30.03.2021
Date on which the typed draft is placed before the other member	30.03.2021
Date on which the approved draft comes to the Sr. PS/ PS	30.03.2021
Date on which the fair order is placed before the dictating member for pronouncement	30.03.2021
Date on which the fair order comes back to the Sr. PS/ PS	30.03.2021
Date on which the final order is uploaded on the website of ITAT	30.03.2021

date on which the file goes to the Bench Clerk	30.03.2021
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	