

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D': NEW DELHI

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT AND
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA No.6607/Del/2013
Assessment Year : 2009-10

M/s Earthstone Holding
Pvt.Ltd.,
18-20, HT House,
K.G. Marg,
New Delhi – 110 001.
PAN : AABCE8511C.
(Appellant)

Vs. Additional Commissioner of
Income Tax,
Range-39(1),
New Delhi.

(Respondent)

Appellant by : Shri Rupesh Jain, Advocate and
Shri Ankit Gupta, CA.
Respondent by : Shri Umesh Chandra Dubey,
Senior DR.

Date of hearing : 08.09.2016
Date of pronouncement : 19.09.2016

ORDER

PER G.D. AGRAWAL, VP :-

This appeal by the assessee for the assessment year 2009-10 is directed against the order of learned CIT(A)-XXVIII, New Delhi dated 23rd September, 2013.

2. The first ground of assessee's appeal reads as under:-

"That the Commissioner of Income Tax (Appeals) erred on facts and in law in affirming the action of the Assessing Officer in disregarding the long term capital loss of Rs.1,37,78,697/- arising on sale of shares returned by the appellant, holding that the transaction of sale of shares gave rise to business income since the dominant intention of the appellant was to earn income from sale of shares."

3. At the time of hearing before us, it is submitted by the learned counsel that the assessee purchased 3,84,588 shares of M/s Acme Telepower Ltd. on 12th November, 2007 for a sum of ₹26,45,96,544/-. All the shares were sold on 6th March, 2009 for a sum of ₹26,56,96,544/-. Thus, there was a single transaction of purchase and sale of shares. The shares were sold after 16 months from its acquisition and after considering the indexed cost of acquisition, the assessee claimed long term capital loss of ₹1,37,78,697/-. The Assessing Officer treated the purchase and sale of the shares as business on the ground that the assessee has intention to take the control of M/s Acme Telepower Ltd. Learned counsel for the assessee clarified that the assessee made the investment in shares because, at the relevant time, M/s Acme Telepower Ltd. was coming up with an IPO. The assessee expected good appreciation in the market value of the shares and, therefore, made investment therein. When the company cancelled its plan of IPO, the assessee realized its investment. That assessee was never in a position to acquire the controlling interest in the said company. He pointed out that the acquisition of the shares by the assessee was only 0.25% of the total shares of M/s Acme Telepower Ltd. Thus, there is no question of any taking over the control and management of M/s Acme Telepower Ltd. He further stated that the assessee invested own funds and no borrowed money was utilized for acquisition of M/s Acme Telepower Ltd. He also pointed out that in its balance sheet ended on 31st March, 2008, the shares were shown as investment. That the presumption of the Assessing Officer that the assessee made the investment in the shares with an intention of earning profit is without any basis.

4. Learned DR, on the other hand, relied upon the orders of authorities below and pointed out that on the investment of more than ₹26 crores, the assessee had earned the dividend income of

₹9,45,821/- only. Thus, the investment in shares was certainly not for the purpose of earning the dividend income but for earning the profit from the sale of shares.

5. We have carefully considered the submissions of both the sides and have perused the material placed before us. After considering the facts of the case, we do not find any justification for the finding of the lower authorities that the shares were acquired with the intention of business in such shares. We find that there was a single transaction of purchase and sale of shares. The purchase was made with own funds. The shares were held for a period of 16 months and then sold. After sale of shares, there is no acquisition of shares of this company or any other company. Neither in the preceding assessment year nor in this year, there is purchase and sale of shares of any other company. In the balance sheet of 31st March, 2008, shares have been shown as investment. Totality of these facts clearly lead to the conclusion that it is a case of investment in shares which was realized later on. The presumption of the Assessing Officer that the shares of M/s Acme Telepower Ltd. were purchased to acquire the management and control of the said company is without any basis. The assessee has pointed out that the shares acquired by the assessee were less than 1% of the total shares of M/s Acme Telepower Ltd. The intention of the assessee at the time of acquisition of shares is to be gathered from the totality of all the facts and, after considering the totality of all the facts, we have no hesitation to hold that the assessee made the investment in the shares. The conclusion of the Assessing Officer that the assessee purchased the shares with the intention of business is without any justification and is only on the basis of presumption and suspicion. In view of the above, we direct the Assessing Officer to accept the long term capital loss on the sale of shares of M/s Acme Telepower Ltd.

6. Ground No.2 of the assessee's appeal reads as under:-

"That the Commissioner of Income Tax (Appeals) erred on facts and in law in affirming the action of the Assessing Officer in disregarding the short term capital gains of Rs.7,860/- arising on sale of mutual funds returned by the appellant, holding that the transaction of sale of mutual funds gave rise to business income since the dominant intention of the appellant was to earn income from sale of mutual funds."

7. We have heard the arguments of both the sides and have perused the material placed before us. The facts relating to this ground are that the assessee made investment in mutual funds which was realized subsequently. From the details of the acquisition of mutual funds, we find that there were total three transactions of acquisition of units of mutual funds and only three transactions of their redemption. There is no frequency of the acquisition and redemption of the investment in mutual funds. Investment is made from own funds. Therefore, in our opinion, the surplus from the redemption of the units of mutual funds should be assessed as short term capital gain (since the redemption is within one year from the investment in mutual funds) rather than business income. Accordingly, ground No.2 of the assessee's appeal is allowed.

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

Decision pronounced in the open Court on 19.09.2016.

Sd/-

(CHANDRA MOHAN GARG)
JUDICIAL MEMBER

Sd/-

(G.D. AGRAWAL)
VICE PRESIDENT

VK.

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1. Appellant : **M/s Earthstone Holding Pvt.Ltd.,
18-20, HT House, K.G. Marg,
New Delhi – 110 001.**
2. Respondent : **Additional Commissioner of Income Tax,
Range-39(1), New Delhi.**
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar