

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "B": DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA.No.5978/Del./2014
Assessment Year 2009-2010

The ACIT, Circle-20(1) Room No.902, Block E-2, Pratyaksh Kar Bhawan, Civic Centre, Minto Road, New Delhi.	vs.,	Shri Devender Kumar Gupta, 10A/15, Shakti Nagar Delhi. PAN AGBPG5221A
(Appellant)		(Respondent)

ITA.No.5760/Del./2014
Assessment Year 2009-2010

Shri Devender Kumar Gupta, 10A/15, Shakti Nagar Delhi. PAN AGBPG5221A	vs.,	The ACIT, Circle-20(1) Room No.902, Block E-2, Pratyaksh Kar Bhawan, Civic Centre, Minto Road, New Delhi.
(Appellant)		(Respondent)

For Revenue :	Shri Subhash Verma, Sr. D.R.
For Assessee :	Shri Vijay Kumar Gupta, Advocate

Date of Hearing :	10.10.2017
Date of Pronouncement :	17.10.2017

ORDER**PER BHAVNESH SAINI, J.M.**

Both the cross-appeals are directed against the order of the Ld. CIT(A)-XXII, New Delhi, dated 17th April, 2014 for the A.Y. 2009-2010.

2. We have heard the Learned Representatives of both the parties and perused the material on record.

3. Briefly the facts of the case are that the assessee is an individual, filed his return of income declaring income of Rs.1,75,09,000. The assessee is running a proprietorship concern by name M/s. A-One Wine Sales Agency which is engaged in the business of trading in liquor and has shown business income. Apart from profit from the above business, assessee has also shown its share trading loss of Rs.2,18,10,060 from investment in the equity shares and loss of Rs.84,09,005 from trading in derivatives. The assessee has also shown loss of Rs.43,34,872 from commodity trading. The income from the business and profession was finally declared at a loss of Rs.2,08,87,278. The assessee has also shown long term capital gains of Rs.3,66,69,217 from sale of a property.

3.1. The A.O. noted that assessee has claimed loss of Rs.1,83,81,003 from equity share trading through M/s. Religare Securities Ltd., and another share trading loss of Rs.34,29,057 from the equity share trading through M/s. Indiabulls Securities Ltd., The total share trading loss claimed by assessee as business loss is thus Rs.2,18,10,060. The assessee has set-off this loss from the profit of his liquor business of Rs.1.37 crores. The A.O. asked the assessee to prove business of share trading and as to why trading loss claimed by assessee, should not be treated as long term capital loss and thereby, set-off from business profit should not be disallowed. The assessee did not furnish reply, instead he submitted the copy of the ledger accounts of both the above parties viz., M/s. Religare Securities Ltd., and Indiabulls Securities Ltd., and submitted that there is loss in share trading. The assessee has been regularly investing in shares and has shown short term gains in preceding A.Y. 2008-09. The department in this year has treated the profit as business income. The assessee has however, filed appeal against this order and the appeal is still pending. In this year just because there is loss in the investment, assessee has claimed the loss as business

loss and return of income for the assessment year under appeal filed, prior to completion of the assessment for A.Y. 2008-09. The A.O. therefore, noted that there is a change in the method of accounting just to set-off his taxable income from liquor trading business. The A.O. also noted that assessee has shown capital investment of Rs.4,50,43,763 in the share trading account which is much more than the capital investment in the liquor trading business. It is noted that as per Board circular and decisions of the Tribunal and the Courts, some of the principles have been laid to decide whether transaction is business or investment which are like - The volume and frequency of the transaction, whether assessee used own funds or borrowed funds, whether assessee earned tax free dividend income and has paid STT, the value of closing stock etc., The A.O. considering the above test held that assessee is an investor and not a trader and the loss of Rs.1,83,81,003 from the equity trading was treated as short term capital loss and the assessee is not be allowed the set off loss from the business profit of liquor trading.

3.2. The A.O. further noted as regards long term capital gains on sale of property that assessee has shown long term capital gains

of Rs.3,66,69,227 from sale of Jharsantil property. The sale consideration received by assessee is Rs.4.95 crores. The assessee has taken the benefit of indexation for calculation of capital gains. The cost of acquisition was shown as Rs.1,28,30,783. The working is reproduced in the assessment order. The A.O. asked the assessee to produce the purchase as well as sale documents relevant to the property for calculation of long term capital gains. The assessee instead of furnishing the required documents, submitted copy of the Power of Attorney between M/s. Whirlpool of India Ltd., and the assessee through which assessee has been given right to sell, transfer etc. but the property would remain with M/s. Whirlpool of India Ltd. The Power of Attorney was reproduced in the assessment order. The A.O. noted that though the assessee claimed ownership of property for the purpose of claiming cost of acquisition but relevant documents have not been filed. Whatever material was produced before A.O. was considered in which certain discrepancies were found. In short, the A.O. noted that assessee has not been able to furnish the documents related to purchase of property at various stages. Therefore, even though the sale receipt of the assessee during

the year is treated as the short term capital gain, the purchase cost claimed by the assessee is taken at NIL since it is not supported by any authentic document. The short term capital gain was, therefore, computed at Rs.4,95,00,000 as against Rs.3,66,69,217 shown by the assessee.

4. The assessee carried both the matters to the Ld. CIT(A) in appeal. The assessee moved application under Rule 46A of the I.T. Rules, 1962 for admission of the additional evidences. The assessee in the application submitted that A.O. asked the assessee on 19th December, 2011 to furnish purchase documents of relevant property. The assessee could not collect the relevant papers for purchase of the property and thus, the A.O. without allowing any effective and sufficient hearing, treated the cost of property as NIL. The assessee produced copies of the agreements for purchase of property from M/s. Whirlpool India Ltd., and relied upon the decision of the Delhi High Court in the case of Vigin Securities and Credits Pvt. Ltd., 332 ITR 396 and decision of Punjab & Haryana High Court in the case of Mukta Metal Works 336 ITR 555 and submitted that additional evidence may be admitted on the issue of computation of short term

capital gains. The assessee also filed written submissions to explain the nature of business activities from trading in shares etc.,

4.1. Remand report from the A.O. was called for. The Ld. CIT(A) on going through the additional documents noted that none of the agreements are registered and discussed various other material and also noted that no justification has been provided as to why these evidences/documents were not produced during assessment proceedings. No justification was made for non-production of the documents because these documents were with the assessee and no reasons have been explained why the assessee has not made any efforts to collect the relevant papers. The A.O. asked for the documents on 19th December, 2011 and A.O. completed the assessment on 30th December, 2011. Therefore, sufficient time is given to produce the relevant documents of the purchase. The Ld. CIT(A) considering these facts, rejected the application under Rule 46A of the I.T. Rules. The Ld. CIT(A) thereafter, proceeded to decide both the issues on merits.

4.2. The Ld. CIT(A) considering the issue of income from transaction in shares, whether business or capital gains, the Ld.

CIT(A) noted that A.O. did not follow rule of consistency. The A.O. assessed the income from share transactions as business income for A.Y. 2008-09 and if A.O. is of the opinion that the principle of consistency should be followed, then, there is no reason why income from share transaction in assessment year under appeal should not be assessed as business income. Merely because there is loss in shares is no ground to ignore the principle of consistency. The Ld. CIT(A) examined the issue in the light of Board Circular and various other decisions in which certain guidelines have been provided as to how the transaction of sale of shares be considered as capital gains or business income. The Ld. CIT(A) considering the facts of the case in the light of Board circular and several decisions found that the assessee has intention to purchase the shares since beginning to do commercial transaction and to earn the profit. Therefore, the intention of the assessee was to do business activities. The sale of shares were effected subsequently for the purpose of making profits in short term. The assessee has treated the shares as stock-in-trade. The A.O. treated the income from transaction in shares in preceding A.Y. 2008-09 as business income on the identical facts. There is a

volume, frequency, continuity and regularity of the transactions during the year under appeal. Thus, an inference can be drawn that activity is in the nature of business. The Ld. CIT(A) therefore, held that assessee's case is within the ambit of business income. The tests towards intention, frequency, ratio between purchase and sale and holdings, purchase and sales being towards realizing profits etc., are mostly in favour of the transactions being treated as business transactions and the income as business income. The cumulative effect of all the factors is thus, for treatment of the income from transactions in shares as business income. The A.O. in preceding A.Y. 2008-09 has considered the similar transaction as business income. The order of the A.O. was accordingly set aside and A.O. was directed to assess the same as business loss and grant set-off accordingly. The appeal of the assessee on this issue was allowed. However, as regards the assessment of the long term capital gains, since no additional evidences were admitted, it was held that assessee did not produce any documents to prove cost of acquisition, therefore, capital gain was taken at the same amount of Rs.4.95 crores and decision of the A.O. was upheld.

5. The Revenue is in appeal challenging the order of the Ld. CIT(A) in holding capital gain of Rs.1,83,81,003 as business loss.

5.1. The assessee in its appeal challenged the order of the Ld. CIT(A) in rejecting the application under Rule 46A of the I.T. Rules, 1962 and in taking the cost of acquisition at NIL of land sold during the period as against indexed cost of acquisition claimed by assessee for a sum of Rs.1,28,30,783.

6. The Learned Counsel for the Assessee submitted that A.O. did not grant sufficient time to produce the documents to prove cost of acquisition of properties on which capital gain was earned. The assessee could not trace-out the documents at assessment stage and it took sufficient time in obtaining the documents from M/s. Whirlpool of India Limited. The same were therefore, produced before the Ld. CIT(A) for admission as additional evidences which were relevant to the matter in issue. Therefore, the same should be admitted by Ld. CIT(A). Ld. D.R, however, relied on order of A.O/CIT(A).

7. We have considered the rival contentions. It is well settled law that additional evidences could be admitted when the same are relevant and required to be looked into. In respect of this proposition, we rely upon the decision of the Hon'ble Supreme Court in the case of Tekram 262 CTR 118 and decision of Hon'ble Punjab & Haryana High Court in the case of Mukta Metal Works 336 ITR 555. The Hon'ble Delhi High Court in the case of CIT vs. Text Hundred India Pvt. Ltd., 351 ITR 57 did not interfere with the order of the Tribunal who has admitted the additional evidence because the assessee could not produce these records before the lower authorities due to non-retrievability of email on the date because of technological defects. The Tribunal looked into the entire matter and arrived at a conclusion that additional evidence was necessary for deciding the issue on hand. The Hon'ble High Court also observed in its Judgment that *"It is well settled that the procedure is hand-mate of justice and justice should not be allowed to be choked only because of some inadvertent error or omission on the part of one of the parties to lead evidence at appropriate stage. Once it is found that the party intending to lead evidence before the Tribunal for the first time was prevented by*

sufficient cause to lead such evidence and that this evidence would have material bearing on the issue which needs to be decided by the Tribunal and the ends of justice demands admission of such evidence, the Tribunal can pass an order to that effect.”

7.1. The Hon'ble Delhi High Court in the case of CIT vs. Virgin Securiteis and Credits P. Ltd., (2011) 332 ITR 396 (Del.) held *that the additional evidence was crucial to the disposal of the appeal and had direct bearing on the quantum of the claim made by the assessee, Rule 46A of the I.T. Rules, 1962, permits the CIT(A) to admit additional evidence if he finds that the same is crucial for disposal of the appeal.* Considering the facts of the case in the light of above decisions, it is clear that the A.O. did not allow the benefit of cost of acquisition of the property while computing the long term capital gains because the documents of purchase have not been produced before A.O. The assessee specifically submitted in the application under Rule 46A that A.O. asked the assessee on 19th December, 2011 to furnish the purchase documents of the relevant property. Since these documents could not be collected, therefore, the same could not be filed before A.O. The A.O. passed the order on 30th December, 2011 and as such

it could not be treated that reasonable and sufficient time have been given to the assessee to procure the documents of purchase of the property to produce at assessment stage. The A.O. has given only 11 days time to the assessee to file the documents of the purchase for the purpose of computing the long term capital gains. Therefore, no sufficient time have been given to the assessee to produce the documents of purchase of property at assessment stage. This is sufficient reason to admit the additional evidence at the first appellate stage. It may also be noted here that the purchase documents are relevant for the purpose of computing the long term capital gains and prove the cost of acquisition of the property. Therefore, these additional evidence goes to the route of the matter and affect quantum of taxable income of the assessee. Since these documents are relevant and goes to the route of the matter and are crucial for the decision making process, therefore, the Ld. CIT(A) should have admitted these additional evidences for the purpose of deciding the appeal of assessee. The Learned Counsel for the Assessee also submitted that in preceding A.Y. 2008-09, the Ld. CIT(A) admitted the additional evidence on the same reason vide

impugned order dated 17th April, 2014, copy of which is placed on record. It therefore, shows that when Ld. CIT(A) could have admitted the additional evidences in preceding A.Y. 2008-09 though on some other issue, the assessee would have the reason to explain that the additional evidence were necessary for disposal of the appeals and no sufficient opportunity have been given to the assessee to produce these documents at assessment stage. The above reason clearly apply to the facts and circumstances of the case. We, therefore, set aside the order of the Ld. CIT(A) and admit the additional evidence for the purpose of disposal of the appeal of assessee, with regard to computation of long term capital gains. Since these additional evidences have not been admitted by Ld. CIT(A) and A.O. has no occasion to examine the same in accordance with law, we are of the view that the entire matter of issue of long term capital gains and the claim of acquisition of indexed cost for long term capital gains, be restored to the file of the A.O. for deciding the issue afresh, in accordance with law. In view of the above discussion, we set aside the orders of the authorities below and restore the matter in issue to the file of the A.O. with a direction to re-decide the issue of long term

capital gains in accordance with law in the light of additional evidences so admitted above. The assessee is directed to file copies of these additional evidence before A.O. for disposal. The A.O. shall give reasonable, sufficient opportunity of being heard to the assessee. Both the grounds of appeal of assessee are allowed for statistical purposes.

8. In the result, ITA.No.5760/Del./2014 of the assessee is allowed for statistical purposes.

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9. As regards the Departmental appeal, the Ld. D.R. merely relied upon the order of the A.O. without pointing out any infirmity in the order of the Ld. CIT(A) in treating the transaction of sale of shares as business income of the assessee. The Ld. CIT(A) examined the issue in the light of Board Circular and various decisions of the Tribunal and the High Court as to whether the transaction in question is business income or capital gains. The A.O. in preceding assessment year 2008-09 has assessed the income from sale of share transaction as business income. Therefore, on rule of consistency,

the A.O. should not take a different view on identical facts. The Ld. CIT(A) in detail considered this issue by considering various tests i.e., intention of the assessee at the time of purchase of shares, borrowed funds used by assessee, frequency of the transaction in assessment year under appeal and holding of the shares as stock-in-trade etc., and thus, he has come to the conclusion that transactions are in the nature of business transactions and the income as business income. The cumulative effect of the fact was thus, for treatment of income from transaction in shares, as business income. Since no infirmity have been pointed out in the order of the Ld. CIT(A) in holding the share transaction to be assessed as business income, we do not find any reason to interfere with the orders of the Ld. CIT(A) in allowing this ground of appeal of the assessee. Therefore, departmental appeal fails and is accordingly dismissed.

10. In the result, ITA.No.5978/Del./2014 of the Revenue is dismissed.

11. To sum-up, appeal of the assessee is allowed for statistical purposes and appeal of the Revenue is dismissed.

Order pronounced in the open Court.

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 17th October, 2017

VBP/-

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3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT "B" Bench
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//By Order//

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