

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E", NEW DELHI
BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
SMT. BEENA A. PILLAI, JUDICIAL MEMBER**

**ITA No.2572/Del/2016
Assessment Year : 2011-12**

Smt. Prem Jain, 2683/85, Gali Patteywali Naya Bazar, Delhi – 110006.	Vs.	ITO, Ward- 29(1), New Delhi.
PAN : AAGPJ5074P		
(Appellant)		(Respondent)

Assessee by : Shri Piyush Kaushik, Adv.
Shri B. L. Gupta, Adv.
Department by : Shri S. R. Senapati, Sr.DR
Date of hearing : 22-02-2018
Date of pronouncement : 22-03-2018

ORDER

PER R. K. PANDA, AM :

This appeal filed by the assessee is directed against the order dated 15.02.2016 of the CIT(A)- 16, New Delhi relating to assessment year 2011-12.

2. Facts of the case, in brief, are that the assessee is an individual and derives income from capital gain and other sources. She filed her return of income on 24.08.2011 declaring total income of Rs.8,60,074/-. During the course of assessment proceeding, the Assessing Officer observed that the assessee has sold share of M/s J.T. Agro Goods Pvt. Ltd. on 10.06.2010 for Rs.60,00,000/-. Against the said receipt/sale, the assessee declared net profit of Rs.26,00,000/- after deducting purchase cost of shares of Rs.3,00,000/- and claiming deduction u/s 35 amounting to Rs.54,75,000/- on account of donation made of Rs.31,00,000/- towards scientific research to M/s Himalaya Trust Dehradun. The assessee accordingly declared income of Rs.8,60,074/-.

3. During the course of assessment proceedings, the Assessing Officer asked the assessee to justify the claim of deduction u/s 35 of the I.T. Act. The assessee filed her reply along with the Audit Report in which it was mentioned that the assessee is “trading in land”. The assessee filed another Audit Report mentioning therein that actually the assessee is trading in shares and not trading in land and it was a clerical mistake. The Assessing Officer, during the course of assessment proceedings, asked the

assessee to file supporting evidences regarding the business activities as claimed by the assessee. From the various details furnished by her, he observed that the assessee purchased shares of a private limited company M/s J.T. Agro Good Pvt. Ltd. for Rs.3,00,000/- on 28.09.2009 and sold the same for Rs.60,00,000/- on 10.06.2010. The assessee filed the confirmations on sale of shares and the relevant details along with the Audit Report of M/s J.T. Agro Good Pvt. Ltd.. The Assessing Officer also recorded the statements of the assessee who was summoned u/s 131 of the I.T. Act. From the various details furnished by the assessee, he observed that 6,00,000 of shares were purchased at the rate of 0.50 paise per share from M/s Banwari Exim P. Ltd. and M/s Prabhash Motor Finance P. Ltd.. In her statement, she submitted that she has purchased the shares of the above two companies on the advices of her husband and sold the shares for Rs.60,00,000/- to Shri Raj Kumar Gupta and Shri Ram Lal Gupta for Rs.30,00,000/- each. The Assessing Officer issued summons to Shri Raj Kumar Gupta and Shri Ram Lal Gupta to attend and file the details of M/s J.T. Agro Goods P. Ltd. and copy of bank account in which the amount of purchase of said shares have been reflected. Subsequently, these persons

filed the relevant details. The Assessing Officer, thereafter, asked the assessee to explain as to why the income claimed as business income should not be treated as “income from short term capital gain” and the deduction claimed of Rs.54.75 lacs u/s 35 of the I.T. Act should not be disallowed. In absence of any explanation filed by the assessee and observing that the assessee had not declared in the past any business income and there was no opening or closing stock of shares, the Assessing Officer disbelieved the business income on account of sale of shares and treated the same as “short term capital gain”. The Assessing Officer also disallowed the claim of deduction u/s 35 of the I.T. Act.

4. In appeal, in absence of any new material brought to notice of the Id. CIT(A) regarding the business activity, he upheld the action of the Assessing Officer in treating the business income from sale of shares as “short term capital gain”. He, however, allowed the claim of alternate deduction u/s 80GGA to the assessee at Rs.31,00,000/- as against the claim of deduction u/s 35 of the IT Act by the assessee.

5. Aggrieved with such order of the Id. CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds of appeal :-

“On the facts and in the circumstances of the case and in law the CIT(A) was incorrect and unjustified in :-

- 1) Not allowing deduction as claimed u/s 35.*
- 2) In restricting the deduction to Rs.31,00,000/- only.*
- 3) In holding that the assessee was not carrying on any business activity.*
- 4) Holding that the assessee was not entitled to deduction u/s 35 in the absence of business income.*
- 5) Holding that the sale of shares was not business income even if the intention was to start any carry on such business.”*

6. Ld. counsel for the assessee at the outset strongly challenged the order of the Id. CIT(A). He submitted that business includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. Referring to the decision of the Hon'ble Supreme Court in the case of CIT vs. Sulej Cotton Mills Supply Agency Ltd. reported in 100 ITR 706, he submitted that the Hon'ble Supreme Court in the said decision has held that a single transaction of purchase and sale outside the assessee's line of business may constitute an adventure in

the nature of trade. It is not necessary to constitute trade that there should be a series of transactions, both of purchase and sale.

7. Referring to the decision of the Hon'ble Supreme Court in the case of G. Venkataswami Naidu & Co. vs. CIT reported in 35 ITR 594, he submitted that the Hon'ble Supreme Court in the said decision has held that in cases where the purchase has been made solely and exclusively with the intention to resell at a profit and the purchaser has no intention of holding the property for himself or otherwise enjoying or using it, the presence of such an intention is a relevant fact and unless it is offset by the presence of other factors it would raise a strong presumption that the transaction is an adventure in the nature of trade.

8. Referring to the decision of the Hon'ble Supreme Court in the case of Smt. Indramani Bai vs. Additional Commissioner of Income Tax reported in 200 ITR 594, he submitted that the assessee in that case had purchased a piece of land and shortly after purchasing land they carved it into four plots and sold them individually. the Assessing Officer brought the difference between compensation received by the assessee and price of

land to tax treating transaction as an adventure in nature of trade. The Hon'ble Apex Court held that such transaction of purchase and sale of land by the assessee was an adventure in nature of trade.

9. Referring to the decision of the Hon'ble Delhi High Court in the case of CIT vs. D & M Components Ltd. reported in 364 ITR 179, he submitted that the Hon'ble Delhi High Court in the said decision has held that where there was short duration of holding of shares and lack of clarity in account books, sale and purchase of shares would lead to business income and not short term capital gains. He also relied on following decisions :-

a. V. Amirtham Ammal vs. CIT, 74 ITR 739.

b. Laxmi Co. vs. CIT, 43 ITR 415.

c. Premji Bhimji vs. CIT, 81 ITR 179.

d. Manoj Kumar Samdaria vs. CIT in ITA No.97/2014 dated 12/03/14.

e. Equity Intelligence India (P.) Ltd. vs. ACIT, 61 taxmann.com 256.

d. Dilip Battu Karanjule vs. ITO, 74 taxmann.com 12.

10. He accordingly submitted that when the transaction is not in dispute and the Assessing Officer has accepted the purchase and sale to be

genuine, therefore, merely because assessee has held the shares for a short period, the same cannot be considered as short term capital gain as against business income treated by the assessee.

11. Ld. counsel for the assessee further submitted that the ld. CIT(A) was not justified in denying the benefit of deduction u/s 35 of the I. T. Act when the assessee has fulfilled the requisite conditions.

12. Ld. DR on the other hand heavily relied on the order of the ld. CIT(A). Referring to the decision of the Mumbai Bench of the Tribunal in the case of ACIT vs. Narendra I. Bhuva reported in 90 ITD 174, he submitted that the Tribunal in the said decision has held that for determining the trade transaction as 'adventure in nature of trade' it depends on a number of relevant circumstances such as (i) subject-matter of transaction, (ii) length of period of ownership, (iii) frequency of number of similar transaction by same person, (iv) supplementary work on or in connection with property realized and (v) circumstances that were responsible for realization and motive. Accordingly, it was held that when

the assessee was not a trader or businessman, purchase of antique car and sale of the same was not to be held to be adventure in nature of trade.

13. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the Id. CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the assessee in the instant case has purchased 6,00,000 shares of M/s J.T. Agro Good Pvt. Ltd. at the rate of 0.50 paise per share from M/s Banwari Exim P. Ltd. and M/s Prabhash Motor Finance P. Ltd.. The assessee subsequently sold these shares for Rs.60,00,000/- to Shri Raj Kumar Gupta and Shri Ram Lal Gupta for Rs.30,00,000/- each totaling to Rs.60,00,000/-. We find the Assessing Officer on the basis of the various documents filed and the statement recorded did not doubt the genuineness of the transactions. However, in absence of such business income declared on account of sale of shares in the preceding year and in absence of any opening or closing stock of shares, the Assessing Officer treated the profit from sale of shares as short term capital gain as against business income declared by the assessee. According to the Assessing Officer, the so-called purchase of shares are

manipulated only to claim the deduction u/s 35 of the I.T. Act out of the donation made of Rs.31,00,000/- and evade the tax.

14. We find, in appeal the Id. CIT(A) upheld the action of the Assessing Officer in considering the profit from sale of shares as short term capital gain. He, however, allowed the alternate claim of the assessee regarding the deduction u/s 80GGA of the I.T. Act and allowed such deduction at Rs.31,00,000/- for which the Revenue is not in appeal. It is the submission of the Id. counsel for the assessee that a single transaction of purchase and sale of shares outside the assessee's line of business may constitute 'adventure in nature of trade'. According to him, when the purchase has been made solely and exclusively with the intention to resell it at a profit and the assessee has no intention of holding the property for herself for a long period or otherwise enjoying and using it, the presence of such an intention is a relevant factor and may constitute an adventure in nature of trade. He submitted that the reason for treating the profit from sale of such shares as short term capital gain as against the business income declared by the assessee was to deny the benefit of deduction u/s 35 of the I.T. Act.

15. We find some force in the arguments advanced by the Id. counsel for the assessee. It is an undisputed fact that the Assessing Officer has not disbelieved the purchase and sale of shares on the basis of the various documents filed before him since ultimately he has treated the profit from sale of shares as short term capital gain. His grievance is that the assessee has manipulated the so-called shares and so-called transaction of shares of one private company is just to claim the deduction u/s 35 of the I.T. Act on the donation of Rs.31,00,000/-. The donation has also not been disbelieved. Under these circumstances, we have to consider as to whether the profit on sale of such shares will constitute an adventure in nature of trade as claimed by the assessee or short term capital gain as treated by the Assessing Officer and upheld by the Id. CIT(A).

16. We find the Hon'ble Supreme Court in the case of Sulej Cotton Mills Supply Agency Ltd. (supra) has held as under (short notes) :-

“It is not necessary to constitute trade that there should be a series of transactions, both of purchase and of sale. A single transaction of purchase and sale outside the assessee’s line of business may constitute an adventure in the nature of trade. Neither repetition nor continuity of similar transactions is necessary to constitute a transaction an adventure in the nature of trade. If there is repletion and continuity, the assessee

would be carrying on a business and the question whether the activity is an adventure in the nature of trade can hardly arise. A transaction may be regarded as isolated although a similar transaction may have taken place a fairly long time before.”

17. We find the Hon'ble Supreme Court in the case of G. Venkataswami Naidu & Co. (supra) has held as under (short notes) :-

“In cases where the purchase has been made solely and exclusively with the intention to resell at a profit and the purchaser has no intention of holding the property for himself or otherwise enjoying or using it, the presence of such an intention is a relevant factor and unless it is offset by the presence of other factors it would raise a strong presumption that the transaction is an adventure in the nature of trade.”

18. We find the Hon'ble Delhi High Court in the case of D & M Components Ltd. (supra) while deciding a somewhat identical issue has held that where there was short duration of holding of shares and lack of clarity in account books, sale and purchase of shares would lead to business income and not short term capital gains. The various other decisions relied by the Id. counsel for the assessee also supports his case that the profits in the instant case of purchase and sale of shares would amount to business income and not short term capital gain as held by the

Assessing Officer. In this view of the matter, we set-aside the order of the Id. CIT(A) and direct the Assessing Officer to allow the claim of business income on account of profit on sale of such shares. Since the assessee succeeds on this issue, the claim of the assessee regarding the deduction u/s 35 of the I.T. Act is also allowed subject to verification of other conditions if any by the Assessing Officer.

19. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on this 22nd March, 2018.

Sd/-
(BEENA A. PILLAI)
JUDICIAL MEMBER

Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

Dated: 22-03-2018.

Sujeet

Copy of order to: -

- 1) The Appellant
- 2) The Respondent
- 3) The CIT
- 4) The CIT(A)
- 5) The DR, I.T.A.T., New Delhi

By Order

//True Copy//

Assistant Registrar
ITAT, New Delhi