

IN THE INCOME TAX APPELLATE TRIBUNAL “D”, BENCH KOLKATA

BEFORE SHRI S. S. VISWANETHRA RAVI, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.1003/Kol/2016

(निर्धारणवर्ष / Assessment Year: 2010-11)

DPJ Viniyog Pvt. Ltd. C/O V.N. Purohit & Co., Diamond Chambers, Unit-III, 4 th Floor, Suit No.4G, 4, Chowringhee, Lane, Kolkata-700016	Vs.	DCIT, Circle-9, Kolkata Aayakar Bhawan, Kolkata – 700 069.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AABCD 5982 F		
(Appellant)	..	(Respondent)

Appellant by : Shri V. N. Purohit, AR

Respondent by : Shri A. Bhattacharjee, Addl. CIT

सुनवाईकीतारीख/ **Date of Hearing** : **24/04/2018**

घोषणाकीतारीख/**Date of Pronouncement** : **13/06/2018**

आदेश / ORDER

Per Dr. A. L. Saini:

The captioned appeal filed by the assessee, pertaining to Assessment Year 2010-11, is directed against an order passed by the Ld. Commissioner of Income Tax (Appeals)-15, Kolkata in Appeal No.199/CIT(A)-15/15-16/Cir-9/R&T/Kol, dated 22.03.2016, which in turn arises out of an assessment order passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), dated 25.03.2013.

2. In this appeal, the main grievance of the assessee is that his short term Capital Gain on sale of shares in Gati Ltd, which should be assessable under the head "Capital Gain", has been assessed under the head "Income from business or profession".

3. The brief facts qua the issue are that assessee company furnished its return of income on 12.10.2010 for Assessment Year 2010-11 declaring total

income to the tune of Rs.71,48,280/-. The assessee's return of income was duly processed u/s 143(1) of the Act. Later, the assessee's case was selected for scrutiny u/s 143(2) of the Act and the Assessing Officer completed the assessment u/s 143(3) of the Act treating the 'Short-term Capital gain' of the assessee as 'business income'. During the assessment proceedings, the Assessing Officer noted that assessee has shown in his return of income under the head income from capital gain to the tune of Rs.59,33,049/- and Income tax was paid as per 111A of the Act. The Assessing Officer asked the assessee to furnish the details of buying and selling of shares. In response, the assessee company furnished a statement showing the details of purchase and sale of shares. Considering the volume, frequency, continuity and regularity of transaction of purchase and sale of shares, the assessee company was further asked to explain why the gain arising out of buying and selling of shares should not be treated as business income instead under the head capital gain. In response, the assessee company furnished a written reply stating that during the F.Y 2009-10 relevant to the Assessment Year 2010-11, the company has acquired only three shares, viz. (i) Gati Ltd., (ii) TCI Finance, (iii) TCI Industries Ltd. and all these three shares have been classified as investment by the company at the time of making entries in the books of accounts and also at the time of preparing its audited financial statements. The motive and intention of the company is duly recorded in its minute book of Board of Directors as well as also confirmed by the auditors while certifying the books of accounts of the company. During the assessment year under consideration, the assessee company has earned a Short Term Capital Gain by selling a part of total holding of one share, that is, Gati Ltd, and the company stated that it has been still holding 6,09,306 shares of Gati Ltd, for more than two years. The assessee further submitted before the Assessing Officer that other two shares acquired by the company i.e. in TCI Finance Ltd. and in TCI Industries Ltd. were still held by the company as long term investment. All these shares were acquired out of the own funds of the company and no fund had been borrowed for acquisition of these shares. Therefore, the assessee submitted

before the Assessing Officer that the transaction of shares should be considered as “investment” and not as “business transaction”.

However, the Assessing Officer rejected the contention of the assessee and noted that the impugned issue which is to be decided, whether the assessee company was engaged in the business of purchase and sale of shares as a trader or as an investor, following criteria should be examined as per the judgment of Hon’ble Andhra Pradesh High Court in the case of PVS Raju &Anr. Vs. Addl. CIT 340 ITR 75 (AP):

- (i) The frequency of buying & selling of shares;
- (ii) The period of holding;
- (iii) The quantum of turnover;
- (iv) The intention of the assessee to make quick profits;
- (v) Purchasing & selling of same script repeatedly;
- (vi) Mere classification of share transaction as investment in the books of accounts of one is not conclusive;
- (vii) The intention of the assessee at the time of purchase & sale;

Therefore, considering the judgment of Hon’ble Andhra Pradesh High Court (supra), the Assessing Officer treated the income on account of purchase and of shares under the head ‘business income’ instead of under the head ‘capital gain’ as claimed by the assessee.

4. Aggrieved by the stand of the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) but without any success. The Id. CIT(A) observed that the date-wise details of purchase and sale of shares of M/s Gati Ltd. that the purchases were made on 112 occasion starting from 24.07.2009 to 24.02.2010. The purchases are done almost on daily basis, therefore, the pattern of purchase and sale shows that the assessee was clearly engaged in the activity of profit booking. If there are large volume of purchase and sale of shares, the, the assessee can be said to be engaged in systematic business activity. The frequency of transactions in shares can be held as a deciding factor whether the assessee is engaged in “business” or

making “investment”. Therefore, the Id. CIT(A) held that assessee is making purchase and sale on a continuous basis and besides being regular and systematic, he can be said to be engaged in business activity and, therefore, assessee’s incomes should be assessable under the head ‘business income’.

5. Aggrieved by the order of the Id. CIT(A), the assessee is in further appeal before this Tribunal.

6. The Id. counsel for the assessee has submitted before us that assessee is a NBFC company and it has done transaction in shares and securities with a motive to keep them as an investment. The assessee has shown the purchase of shares under the head ‘investment’ and not as ‘closing stock’. The Id. counsel also submitted that the investments are valued by the assessee at cost and the assessee is not claiming diminution in value of investment shown in the books of account. The assessee company does the entry in the books of account as an investment and has been showing as an investment in the balance sheet. Therefore, the Id. counsel submitted before us that the shares purchase by the assessee company is only for investment purpose not to do the trading in shares and, therefore, gain on sale of shares should be treated under the head ‘short term capital gain’. In addition to this, the Id. counsel for the assessee relied on the judgment of the Hon’ble ITAT, Kolkata in ITA No.431/Kol/2011 for Assessment Year 2007-08 wherein it was held that assessee did not claim any loss due to fall in value of capital asset or investment, which would have been the case if the said investment is to be treated as stock in trade. Even the assessee is consistently valuing the investment at cost. The assessee is consistently offering the income accruing to him from sale of shares under the head capital gains and the same is accepted by the Income Tax Department. Therefore, the Id. counsel submitted that the assessee has been consistently showing the gain under the head ‘capital gain’ and there is no stock in trade in respect of investments and all the investments are being valuing at cost.

7. On the other hand, the Id. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have noted in our earlier para and is not being repeated for the sake of brevity.

8. We have given a careful consideration to the rival submissions and perused the materials available on record, we note that treatment shown by the assessee in his books of accounts is an 'investment'. It is undisputed fact that the assessee has not shown these shares as a part of closing stock. The assessee has been valuing these investments at cost and does not claim the diminution in the value of these shares. The motive of the assessee is to earn the dividend not to trade in shares and the same is getting reflected with the intention of the assessee. Moreover, the Id. counsel pointed out that Board of Directors of this company has passed the resolution stating that the motive of the assessee company is to keep the shares as an investment not as stock-in-trade.

9. We note that in subsequent assessment years i.e. Assessment Year 2011-12, the assessment was completed u/s 143(1) of the Act and the Department has accepted the treatment of the assessee under the head 'Short Term Capital Gain'. In subsequent assessment year i.e. Assessment Year 2012-13, which has been completed u/s 143(3) of the Act and the Department has accepted the stand of the assessee to show the investment under the head 'Short Term Capital Gain'. Likewise, in Assessment Year 2014-15, the assessment was completed u/s 143(1) of the Act and the Department has accepted the stand of the assessee to show the income of the investment under the head 'capital gain'. Therefore, in subsequent years, the Department has been consistently accepting the stand of the assessee.

10. We are of the view that on the issue, whether income in question is to be assessed under the head 'income from capital' or 'income from business' the assessee should demonstrate the intention and treatment in that books of accounts, whether he holds these shares and securities as an 'investment' or as a 'stock-in-trade'. The intention can be judged by the entry made by the assessee in his books of accounts, i.e., the treatment in his books of

accounts of the assessee. We note that, since, the assessee has shown the investment in its books of accounts under the head 'investment' and not under the head 'stock in trade', therefore, the intention of the assessee is not to treat them business income but to treat them as an investment. We find strength of the above discussion in the judgment of Hon'ble ITAT, Kolkata in the case of M/s Divyan Tie Up ITA No.164/Kol/2016 Assessment Year 2010-11 wherein it was held as under:

"6. We are of the view that on the issue, whether the income in question has to be assessed under the head income from capital gain or income from business, the assessee should demonstrate the intention and treatment in the books of accounts, whether he holds these shares and securities as an 'investment' or as a 'stock in trade'. This intention can be judged by the entry made by the assessee in his books of accounts, that is, the treatment in the books of accounts of the assessee. We note that since, the assessee has shown the investment in its books of accounts under the head investment and not under the head stock in trade, therefore, the intention of the assessee is not to trade in shares but to treat them as an investment.

7. We also note that the CBDT has issued Circular No.6 of 2016 wherein it has been provided as follows:

"2.....However, this stand, once taken by the assessee in a particular assessment year shall remain applicable in subsequent assessment years also and the taxpayer shall not be allowed to adopt a different/contrary stand in subsequent assessment years...."

This Circular is in respect of how to treat the income from shares, as business income or capital gains. Therefore, we note that the intention of the assessee is to treat the trading in shares as an investment in the books of accounts. The assessee has not shown the shares as a part of the closing stock in the balance sheet, the assessee has shown shares under the head investment, therefore, the intention of the assessee is not to trade in shares but to deal in shares as an investor."

11. Therefore, considering the facts and circumstances of the assessee's case under consideration and the factual position discussed above, we note that assessee is having only one portfolio that is of investment and is consistently following to declare capital gain or loss on sale on investment, dividend is earned on investment and there is not stock in trade portfolio. Besides, the assessee is consistently valuing investment at cost and does not claim the diminution in valuing of investment. We have noted the intention of the assessee that the Board of Directors of the assessee company has passed the resolution stating that the motive of the company is to deal in investment and not to trade in shares, therefore, we are of the view that

assessee's income i.e Short term Capital Gain by way of sale of investment should be assessed under the head 'capital gain' instead of 'business income'. Therefore, we direct the Assessing Officer to treat the assessee as an investor and assess the income under the head 'Short term Capital Gain'.

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

Order is pronounced in the open court on 13.06.2018.

Sd/-
(S. S. VISWANETHRA RAVI)

न्यायिक सदस्य / JUDICIAL MEMBER

कोलकाता /Kolkata;

दिनांक Date: 13/06/2018

(RS, Sr.PS)

Sd/-
(A. L. SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant- DPJ Viniyog Pvt. Ltd.
2. प्रत्यर्थी/ The Respondent-DCIT, Circle-9, Kolkata
3. आयकरआयुक्त(अपील) / The CIT(A)-15
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.
सत्यापितप्रति

True Copy

By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata.