

IN THE INCOME TAX APPELLATE TRIBUNAL "A", BENCH KOLKATA

BEFORE SHRI A. T. VARKEY, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.164/Kol/2016

(निर्धारणवर्ष / Assessment Year: 2010-11)

I.T.O Wd-3(1), Kolkata	Vs.	M/s. Divyam Tie-Up Pvt. Ltd.
Aayakar Bhawan, P-7, Chowringhee Square, Kolkata – 700 069.		Room No.204A, I-British Indian St., Kolkata – 700 069.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AACCD 2221 P		
(Appellant)	..	(Respondent)

Appellant by : Shri Sallong Yaden, Addl. CIT
Respondent by : Shri S.M. Surana, Advocate

सुनवाईकीतारीख/ Date of Hearing : 12/04/2018

घोषणाकीतारीख/Date of Pronouncement : 26/04/2018

आदेश / O R D E R

Per Dr. A. L. Saini:

The captioned appeal filed by the Revenue, pertaining to Assessment Year 2010-11, is directed against an order passed by the Ld. Commissioner of Income Tax (Appeals)-5, Kolkata in appeal No.106/CIT(A)-5/Cir-3/13-14/14-15, dated 24.11.2015, which in turn arises out of an assessment order passed by the Assessing Officer u/s 143(3)/144 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') dated 28.03.2013.

2. The Grievances raised by the Revenue in this appeal are as follows:

- 1. On the facts and circumstances of the case and in law, Ld. CIT(A) has erred in allowing business income of Rs.1,12,64,140/- as Short Term Capital Gain even though the assessee company is engaged in business of trading of shares.*
- 2. On the facts and circumstances of the case and in law, Ld. CIT(A) has erred in not giving any reasons to treat the Business income as Short Term Capital gain as each year is independent Assessment Year.*
- 3. That the appellant craves leave to add, alter, amend or modify the grounds of appeal during the course of hearing proceedings of this case."*

3. The brief facts qua the issue are that during the assessment proceedings, the Assessing Officer observed that assessee company in its Profit & Loss A/c has credited an amount of Rs.1,12,64,140/- on account of profit on sale of share. Further in its computation of income, the assessee company has claimed it as short term capital gain and paid tax at the special rate of 15%. On perusal of the audited accounts and hard copy of ITR-6 it was found by the assessing officer that the business of assessee is trading in shares. Therefore, the Assessing Officer noted that the claim of the assessee required verification and examination to the point of frequency, consistency, as well as the intention of the assessee company in making the share transactions. The intention of the assessee is to be judged whether he deals in share as a trader or as an investor and to ascertain the intention of the assessee, the AO required certain details from the assessee. But the assessee failed to file the relevant details during the assessment proceedings to establish whether he is trading in shares or does investment in shares as an Investor. Therefore, the Assessing Officer treated the income shown by the assessee as business income under the head 'Income from Business', whereas the assessee claimed it under the head 'Income from Capital gain'. The Assessing Officer also treated the investments in the balance sheet of the assessee as stock-in-trade. Hence considering the above aspect and facts, the Assessing Officer treated the income of Rs.1,12,64,140/- as 'income from business' instead of as income under the head 'short-term capital gain'.

4. Aggrieved by the stand of the Assessing Officer, the assessee carried the matter in appeal before the Id CIT(A), with success, who has directed the assessing officer to treat the income of the assessee under the head 'short-term capital gain'. Aggrieved with the order of the Id. CIT(A), the Revenue is in appeal before us. The Id. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer which we have already noted in our earlier para and is not being repeated for the sake of brevity. On the other hand, the Id. counsel for the assessee has defended the order passed by the Id. CIT(A).

5. We have given a careful consideration to the rival submissions and perused the materials available on record, we note that period of holding in respect of shares traded by the assessee were less than 12 months and we note that assessee's claim has been admitted by the Department under the head 'short-term capital gain' in subsequent Assessment Years 2012-13, 2014-15 and 2015-16, while passing the assessment orders under section 143(3) of the Act. In the previous year 2009-10, the assessee's claim has been admitted by the Department under the head 'short-term capital gain', in the assessment completed under section 143(1) of the Act. We note that the Id. CIT(A) observed that the short term capital gain of the assessee for the Assessment Year 2012-13 had been treated by the Department as 'short-term capital gain, under the head 'Income from capital gain'. Therefore, considering the concept of consistency and holding period of shares, the Id. CIT(A) directed the Assessing Officer to treat 'short-term capital gain, instead of income under the head of 'business income'.

The Id Counsel for the assessee submitted before us a chart showing treatment of shares as 'short term capital gain, which is referred as Annexure-A to this order, which gives the details of short term capital gain shown by the assessee in his computation of total income during the previous year and subsequent assessment years, which have given rise to the short term capital gain. We find right from A.Y.2009-10, to till A.Y.2016-17, the assessee had been showing short term capital gain (STCG) and the Department has been accepting under the head 'short term capital gain'. That is, in respect of shares which were held as investment, gain on transfer of those shares was declared under the head 'short term capital gain, and the same was accepted by the Department. We note that in case of some assessment years the assessment was made u/s 143(1) of the Act but the assessee's claim was accepted by the Department, as 'short term capital gain'. We note that for the assessment years, namely, A.Y.2012-13, 2014-15 and 2015-16 assessment was completed u/s 143(3) of the Act and the Department accepted the claim of the assessee as 'short term capital gain', vide Annexure-A forming part of this

order. That is, in case of both the assessments, whether it is under section 143(1) of the Act or whether it is under section 143(3) of the Act, the claim of the assessee has been accepted by the Department under the head 'short term capital gain'. In such circumstances we are of the view that taking a different stand in the present assessment year 2010-11, would be violation of principles of consistency and the Revenue should not be permitted to take such a stand. We, therefore, of the view that the gain on sale of shares held as investments will give raise to "short term capital gain" and has to be assessed as such.

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.

8. We note that the Department has been consistently accepting the assessee's computation under the head 'short term capital gain, therefore, we uphold the order of the Id. CIT(A) following the Rule of consistency. For that we rely on the judgment of the Hon'ble Supreme Court in RadhasoamiSatsang vs. CIT 193 ITR 321 (SC), wherein the Hon'ble Supreme Court held as follows"

"9. We are aware of the fact that, strictly speaking, res judicata does not apply to IT proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

One these reasonings, in the absence of any material change justifying the Revenue to take a different view of the matter—and, if there was no change, it was in support of the assessee—we do not think the question should have been reopened and contrary to what had been decided by the CIT in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under ss. 11 and 12 of the IT Act of 1961."

In the assessee's case under consideration, the Department has been accepting the stand of the assessee, during the previous year as well as in subsequent years to disclose the income on account of sale of investments under the head 'short term capital gain'. Moreover, the assessee's intention is to be as an 'Investor, as has been observed by the treatment in the books of accounts as 'investment'. Therefore, we note that there is consistency in the 'intention of the assessee' as well as treatment in the books of accounts, and the said consistency has not been challenged by the department by bringing any new facts on the record. Hence, following the judgment of the Hon'ble Supreme Court in the case of RadhasoamiSatsang (supra), we confirm the stand taken by the Id CIT(A).

That being so, we decline to interfere in the order passed by the Id. CIT(A) and the order of the Id. CIT(A) on this issue is hereby upheld and the appeal of the Revenue is dismissed.

9. In the result, the appeal filed by the Revenue is dismissed.

Order is pronounced in the open court on 26/04/2018.

Sd/-
(A. T. VARKEY)

न्यायिक सदस्य / JUDICIAL MEMBER

कोलकाता /Kolkata;

दिनांक Date: 26/04/2018

(RS, SPS)

Sd/-
(A. L. SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant-I.T.O Wd-3(1), Kolkata
2. प्रत्यर्थी/ The Respondent- M/s. Divyam Tie-Up Pvt. Ltd.
3. आयकरआयुक्त(अपील) / The CIT(A),
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.