आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "ई" मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL" E" BENCH, MUMBAI

BEFORE S/SHRI B.R.BASKARAN, AM AND AMARJIT SINGH, JM

आयकर अपील सं./I.T.A. No.5395 and 5396/Mum/2011

(निर्धारण वर्ष / Assessment Years: 2004-05 and 2005-06)

Storewell Credits and Capital Pvt. Ltd., Office No.1, 1st floor, Range Bhavan, M G Cross-Road, Near Bank of Baroda, Vile Parle (E), Mumbai-400057	बनाम/ Vs.	Addl.Commissioner of Income Tax Range 5 (3), 5th floor, Aayakar Bhavan, M K Road, Mumbai-400020
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN. :AADCS9571Q	

अपीलार्थी ओर से / Assessee by	Shri S V Joshi
प्रत्यर्थी की ओर से/Revenue by	Shri Sujit Bangar

सुनवाई की तारीख / Date of Hearing : 24.8.2015

घोषणा की तारीख /Date of Pronouncement:28.10.2015

आदेश / O R D E R

Per B R Baskaran, AM:

Both the appeals filed by the assessee are directed against the common order dated 06-04-2011 passed by Ld CIT(A)-9, Mumbai for assessment years 2004-05 and 2005-06. The issues urged in both these appeals are identical in nature and hence they were heard together and are being disposed of by this common order, for the sake of convenience.

2. The grounds urged by the assessee relate to the following issues:-

(a) Assessment of Capital gain arising on sale of shares as "Business income".

(b) Non-allowing of expenses, if the profit on sale of shares is assessed as Business income.

(c) Rejection of claim to value closing stock of shares at lower or cost or market value.

3. The facts relating to the case are stated in brief. The assessee company was formed in the year 1994 with the objective of making investment in shares and also do financing activities. It effectively commenced operations in the year relevant to the AY 2004-05. Its gross income for the year relevant to AY 2004-05 and 2005-06 consisted of following items of receipts:-

Particulars of receipts	**AY 2005-06**	**2004-05**
Profit on sale of shares	3,70,58,123	5,17,13,449
Interest income	11,81,549	4,44,026
Dividend income	30,17,098	32,46,765

It is also pertinent to note that the assessee suffered on sale of shares to the tune of Rs.2,00,94,768/- and Rs.97,23,342/- during the years relevant to the AY 2005-06 and 2004-05 respectively. The assessee declared profit/loss arising on sale of shares under the head Income from Capital gains. However, the AO assessed the same as "Business income" of the assessee. The Ld CIT(A) also confirmed the action of the AO.

4. In the alternative, the assessee claimed for deduction of expenses, if the profit is assessed as business income. The Ld CIT(A) gave directions to the AO to consider the alternative claim of the assessee. However, according to the assessee, the said direction did not cover expenses

relating to interest and various other expenses. The assessee had valued the closing stock of shares "At cost". Before the tax authorities, it did put a claim to allow valuation of the closing stock of shares at lower of cost or market value. The said claim did not find favour with the tax authorities. Hence the assessee has urged before us both the alternative claims discussed above.

5. It may be noticed here that the appeals filed by the assessee before the Tribunal were originally disposed of by restoring the matter to the file of Ld CIT(A) with the direction to pass a reasoned order. In the set aside the proceedings, the Ld CIT(A) confirmed the order of the assessing officer.

6. The Ld Counsel appearing for the assessee submitted that the assessee had held the shares for sufficiently long period and further the own funds available with the assessee were sufficient enough to make the investments. He further submitted that the assessee has shown the purchase of shares as "Investment" in its books of account and also earned sufficient amount of dividend income. Accordingly he submitted that the tax authorities are not justified in assesing the profit arising on sale of shares as business income of the assessee. He further submitted that the Tribunal has considered an identical issue in AY 2006-07 and has held that the profit arising on sale of shares is assessable as Capital gain only.

7. The Ld D.R, on the contrary, submitted that the assessee has borrowed funds for purchasing shares. Further the volume of purchase and sales are very high which would vindicate the stand of the AO that the assessee has acted as trader in shares. He further submitted that the

assessee has not held all the scrips for longer period, i.e., only few scrips were held for three months to nine months. In this regard, the Ld D.R invited our attention to paragraph 7 (page 10) of the assessment order relating to AY 2004-05. He further submitted that assessee did not receive dividend income from all the shares, which show that the intention of the assessee was not to earn dividend income by making investments, but it was to earn profit by trading in shares.

8. We heard the parties and perused the record. We notice that the assessee company was formed with the main objective of carrying on financing activities. Though the assessee company was formed in the year 1994, it effectively commenced its operations only in the year relevant to the assessment year 2004-05. A perusal of the components of gross receipts extracted above would show that the assessee has earned major chunk of its income through the profit arising on sale of shares.

9. The contention of the assessee is that it has held the shares as its "Investments" and hence the profit arising on sale of shares should be assessed under the head "Capital gains". We have noticed that the assessee has earned major portion of its income through share trading activity and further it has also incurred losses in that activity in both the years. The Assessing officer has noticed that the volume of purchase and sale of shares was very high in both the years. For example, in the year relevant to AY 2004-05, the assessee has purchased shares worth 43.69 crores and sold shares worth Rs.39.82 crores, both aggregating to about Rs.83 crores. The high volume of turnover, in our view also, shows that the assessee was continuously carrying on the activity of purchase and sale of shares.

10. The assessee has claimed that it has used own funds for purchasing shares. However, an analysis of Balance sheet filed by the assessee, in our view, shows otherwise. The Balance sheet as at 31.03.2004 shows that the assessee had share capital of Rupess one lakh only and the Reserves & Surplus was shown at Rs.259.56 lakhs, which actually represents the profit earned during the financial year ending 31.3.2004. Thus, effectively, the assessee had held own funds only to the tune of Rs.1.00 lakh during the year ending 31.3.2004. Hence the investments of Rs.806.75 lakhs, which was available as on 31.3.2004, has been fully funded by the borrowed funds of Rs.1082.08 lakhs only. Thus, we notice that the assessee has purchased shares only out of borrowed funds during the financial year relevant to the AY 2004-05. In the year relevant to the assessment year 2005-06, the assessee has brought in Share capital to the tune of Rs.5.00 crores. However, we notice that the borrowings have come down only to Rs.836.68 lakhs, which means that the assessee has repaid loans only to the tune of Rs.245.40 lakhs. The repayment of loan was equivalent to the profit earned in the immediately preceding year, which means that the share capital raised during the year relevant to AY 2005-06 was not used to repay the loans. These factual figures would show that the assessee has continued to use the borrowed funds for its share trading activity during the year relevant to AY 2005-06 also.

11. We have earlier noticed that there is merit in the observation of the tax authorities that the assessee has carried out the share trading activity in a continuous manner, in view of the huge volume of purchases and sales. The very fact that the assessee has incurred losses also in the share trading activity further fortifies the same, since the sale of share at losses would be normally undertaken to reduce further loss, which would be possible only if one continuously monitors the movements of the share

market. Thus, it is seen that the assessee has been monitoring the movement of share prices in a continuous manner, which is the striking feature of a Share trader only. Further, we have noticed that the interest income formed miniscule portion of its gross income. We notice that the assessee has given loans and advances only to seven parties in the year relevant to AY 2004-05 and to five parties in the year relevant to AT 2005-06 (see pae 114 of paper book filed for AY 2005-06). Since loans have been given to few parties, the financing activity should not have consumed much time of the assessee. Hence, there is merit in the observation of the AO that the assessee has devoted most of its time to share trading activity only.

12. Further, a perusal of the Computation of total income filed by the assessee for both the years under consideration would show that the assessee has declared huge amount of "Short term Capital gains" only (Rs.412.07 lakhs in AY 2004-05 and Rs.165.12 lakhs in AY 2005-06) in both the years, except a nominal amount of Rs.6047/- as Long term capital gain in AY 2005-06. Absence of Long term capital gains belies the contention of the assessee that its intention at the time of purchase of shares was to hold them as investments. Hence, we find merit in the observations of the tax authorities that the assessee did not intend to hold the shares for a longer term, which is one of the main features of a trader.

13. The assessing officer has also pointed out that the Object clause of the assessee permits dealing in shares and hence the assessee was dealing in shares as a trader only. The assessing officer has further pointed out that the dividend has been earned only from part of the shares, which shows that the intention of the assessee was not always to earn dividend income by holding the shares as its investment. The

assessing officer has also pointed out that the entries made in the books of account are not always determinative factor to decide about the intention of the assessee. We also agree with the said observations of the tax authorities.

14. In view of the foregoing discussions, we are of the view that it cannot be said that the assessee's intention at the time of purchase of shares was to hold them as investments. In our view, the assessee's conduct and surrounding circumstances discussed above would show that the assessee has actually intended to deal in shares as a trader only. Hence, in our view, the Ld CIT(A) was justified in confirming the assessment of profit arising on sale of shares as business income of the assessee.

15. Before us, the assessee placed reliance on the order passed by the co-ordinate bench in AY 2006-07, wherein the Tribunal has reversed the findings of the assessing officer, i.e., this issue was decided in favour of the assessee. We further notice that the order passed by the Tribunal for AY 2006-07 was subsequently followed by the Tribunal in AY 2007-08 and 2008-09. Admittedly all the above said orders pertain to succeeding years, where as we have considered the facts available on record for the years under consideration and confirmed the order of the Ld CIT(A). The assessee has also placed reliance on the decision rendered by the Hon'ble Bombay High Court in the case of CIT Vs. Gopal Purohit (ITA No.1121 of 2009 dated January 6, 2010). We are unable to understand as to how the assessee could place reliance on the above said decision to support its case. In fact, the assessing officer has consistently assessed the profits arising on sale of shares as Business income only in AY 2004-05 to 2008-09. Hence, there is no inconsistency in the stand of the assessing officer

and hence, we are of the view that the assessee could not place reliance on the above said decision of Hon'ble jurisdictional Bombay High Court. Since we have decided this issue on the basis of facts available in the instant case, the other case law relied upon by the assessee need not require consideration.

16. In view of the foregoing discussions, we uphold his order on this issue.

17. The alternative contention of the assessee is that the assessing officer should be directed to allow the interest expenses and other expenses, if the profit arising on sale of shares is assessed as business income. We notice that the Ld CIT(A) has already given similar directions to the assessing officer. Accordingly, we modify the order of Ld CIT(A) on this issue and direct the AO to consider all the expenses that may be claimed by the assessee.

18. The next issue contested by the assessee relates to the valuation of the closing stock of shares. Though the assessee valued the shares "At cost" in the books, it claimed before the assessing officer that the valuation should be done at lower of cost or market value of shares. The said claim was rejected by both the tax authorities. We notice that the assessing officer has observed that the assessee has chosen to value its closing stock of shares at cost in its books of account and further the "Profits and gains from business" has to be arrived at in accordance with the method regularly followed by the assessee. The AO has further pointed out that the closing stock of the first year becomes opening stock of the succeding year and hence the ultimate tax effect would be nil. In our view, there is merit in the stand taken by the assessing officer. As

observed by him the Profits and gains of business has to be arrived at the method of accounting regularly followed by the assessee. Since the assessee has chosen to value its closing stock of shares at Cost price, we are of the view that the tax authorities are justified in rejecting the claim of the assessee to value the shares at lower of cost or market value.

19. In the result, both the appeals filed by the assessee are treated as partly allowed for statistical purposes.

Pronounced accordingly on 28 th Oct, 2015.

घोषणा खुले न्यायालय में दिनांकः 28 th Oct, 2015 को की गई ।

Sd	**sd**
(AMARJIT SINGH)	**(B.R. BASKARAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

मुंबई Mumbai: 28th Oct, 2015.

व.नि.स./ SRL , Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार**/** BY ORDER,

True copy

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai