

आयकर अपीलिय अधीकरण, न्यायपीठ - "ए", कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH : KOLKATA

(समक्ष) श्री एस. भी.मेहरोत्रा, लेखा सदस्य एवं श्री महावीर सिंह, न्यायीक सदस्य,)
[Before Sri S.V. Mehrotra, A.M. & Sri Mahavir Singh, J.M.]

आयकर अपील संख्या / I.T.A No. 195/Kol/2011

Assessment Year : 2006-2007

Income Tax Officer,
Ward-12(3), Kolkata
(अपीलार्थी /Appellant)

-vs.-

M/s. Landmark Finance Pvt. Ltd., Kolkata
(PAN : AAACL 4460 A)
(प्रत्यर्थी/Respondent)

&

C.O. No. 14/Kol./2011

Assessment Year : 2006-2007

M/s. Landmark Finance Pvt. Ltd.
(Mint Investment Ltd.), Kolkata
(Cross Objector)

-vs.-

Deputy Commissioner of Income Tax,
Circle-12, Kolkata
(Respondent)

For the Assessee : Shri D.S. Damle, A.R.

For the Department : Shri D.R. Sindhal, D.R.

सुनवाई की तारीख/Date of Hearing : 28.11.2011

घोषणा की तारीख/Date of Pronouncement : 28.12.2011

आदेश/ORDER

Per Shri S.V. Mehrotra, Accountant Member/ श्री एस. भी.मेहरोत्रा, लेखा सदस्य :-

We first take up the appeal being ITA No. 195/Kol./2011.

This appeal filed by the Revenue is against the order of Id. Commissioner of Income-Tax (Appeals)-XII, Kolkata dated 15.11.2010 for the assessment year 2006-07.

2. Brief facts of the case are that the assessee-company in the relevant assessment year carried on the business of trading in shares and securities and investment in shares and securities. The Assessing Officer noticed that the assessee had shown long-term capital gains and short-term capital gains from sale and purchase transaction of shares. The net profit on sale of investment was shown at Rs.1,79,79,275/-. He further noticed that assessee had shown both trading and investment activity. He required the assessee to explain as to why the profit on sale of shares amounting to Rs.1.79 crores be not treated as business profit. The assessee's reply has been reproduced at pages 2 & 3 of assessment order. After considering assessee's submission, the Assessing Officer noticed that one of the objects of the company as per the Memorandum of Association was as under :-

(1) To carry on the business of an investment trust company and to underwrite, sub-underwrite, to invest in and acquire and hold, sell, buy or otherwise deal in shares, debentures, debenture-stocks, bonds, units, obligations and securities issued or guaranteed by Indian or foreign Governments, State, Dominions, Sovereigns Municipalities or Public Authorities or Bodies and Shares, stocks, debentures, debenture-stocks, bonds, obligations and securities issued and guaranteed by any company, Corporation, firm or person whether incorporated or established in India or elsewhere”.

(2) The assessee-company carried out large volumes of transactions and some of the transactions completed in a very short period of few days. Thus motive of the assessee-company while buying and selling the units was to earn profit.

(3) The assessee had not received any dividend form the shares/units held as stock-in-trade and shares and units held as investments.

(4) The assessee had no separate Demat Accounts for its activities, i.e. trading and investment. The distinction between shares and units held as stock-in-trade and shares and units held as investment was an artificial one without any reasonable and scientific basis.

Assessing Officer observed that only activity of the assessee-company was to carry on the business of buying and selling of shares/units in a systematic and organized manner. Assessing Officer relied on the following decisions :-

- (i) Commissioner of Inland Revenue –vs.- Tyre Investment Trust Limited (1924) 12 TC 646 (KB);
- (ii) CIT –vs.- Distributors Baroda [83 ITR 377];
- (iii) CIT –vs.- Amalgamations Pvt. Ltd. [108 ITR 885]
- (iv) CIT –vs.- K.S. Venkatasubbaiah Reddiar [221 ITR 18];
- (v) State of Andhra Pradesh –vs.- H. Abdul Bakshi & Brs. [1964] 15 STC 644;
- (vi) G. Venkataswami Naidu & Co. –vs.- CIT [1959] 35 ITR 594 (SC).

He, therefore, held that the profit on purchase and sale of shares and units of Rs.1,79,79,275/- was to be treated as business income of the assessee.

3. Before Id. CIT(Appeals), the assessee submitted that Long-term capital gain of Rs.1,79,79,275/- was derived from transfer of shares and units after paying Security Transaction Tax (STT). Since capital asset was held for more than 12 months and the assessee had paid STT, the assessee claimed exemption under section 10(38) of the Income Tax Act.

The gain was earned on transfer of shares of nine companies and units of two mutual funds. It was explained that the assessee company since earlier years was engaged in dealing in shares as also making investments even in the past years. The assessee held shares by way of trading stock as also by way of investments in shares, which were intended to be held for longer period for earning dividend and capital appreciations were taken to investment account. The shares intended to be turned over within shorter period was taken to "stock-in-trade" account in the books of account. Thus, in the books of account it maintained two separate and distinct accounts in respect of trading shares and investments. The investments were disclosed in the Balance-sheet "at cost". No profit or loss on account of 'valuation of shares' was accounted in the books of account of the assessee. In respect of shares held by way of stock-in-trade, the transactions were routed through company's Profit & Loss A/c. The shares held in stock on the balance sheet dates were always valued on the principle of 'lower of the cost or market value'. Thus loss in the value of inventory was recognized and accounted in the accounts at the time of preparation of balance-sheet. In respect of shares sold on investment account, the assessee did not claim rebate under section 88E in respect of STT paid on sale and purchase of shares held as investment. The Assessing Officer treated the assessee to be dealer in shares for the purpose of denying the exemption under section 10(38) of the Income Tax Act. However, when it came to granting deduction for valuation loss or granting rebate under section 88E, the Assessing Officer did not regard the assessee to be dealer in shares and did not grant statutory relief to which assessee would have been entitled had it been a dealer in shares. Thus the Assessing Officer had taken contradictory stand. Prior to assessment year 2005-06, the Assessing Officer accepted the assessee's claim as dealer in shares as also investor in shares. The Assessing Officer made departure from the accepted position in assessment year 2005-06 and onwards only with a view to deny the assessee's benefit of concessional tax treatment which was introduced in the Income Tax Act by the Finance (No. 2) Act, 2004. The assessee relied on the decision of the Hon'ble Supreme Court in the case of Madan Gopal Radheylal -vs.- CIT [73 ITR 652], wherein it was, inter alia, held that there cannot be a presumption that every acquisition by dealer in a commodity is for the purpose of his business. A person can hold same commodity as its investment apart from stock in trade of his business. This fact has been recognized by the Board in its Circular No. 4 of 2007 wherein the Board accepted that assessee can simultaneously hold the shares both by way of investment as well as stock-in-trade. It was further submitted that in a case involving almost similar facts the Assessing Officer had

assessed capital gains on sale of shares as business income in the case of M/s. S.K. Sonthalia Securities Pvt. Ltd for the AY 2004-05 & 2005-06. The reasoning given and the case laws relied in the order for A.Y.2005-06 was identical to the facts of the assessee's case. On appeal the CIT(A) upheld the assessee's claim that assessee could simultaneously hold shares on investment account as also on trading account and AO was not justified in holding the assessee to be dealer in shares only. The CIT(A) directed the AO to assess the profit on sale of investment shares under the head capital gains and grant statutory concessions. The appeal against the Id. CIT(A)'s order was dismissed by the Tribunal vide its order dated 21.08.2009 in ITA Nos. 2054 & 2061 /Kol of 2008. Copy of the said appellate order of Tribunal has been filed. The appeal filed by the revenue against the said order of the tribunal was dismissed by the Calcutta High Court. The Addl. CIT-R-12 in the regular assessments for AY 2006-07 and 2007-08 assessed the profits on sale of investment shares as capital gains and profit from trading operations as business income. Thus it was submitted that on the identical facts and involving same taxing principles; the superior authority i.e. Addl. CIT, R- 12, Kolkata for A.Y.2006-07 accepted in principle that an assessee can simultaneously be investor as well as dealer in shares. It was, therefore, submitted that the department cannot adopt and hold contrary views involving identical facts. It is more so because in the assessment orders for A.Y. 2005-06 in case of S. K. Sonthalia Securities Pvt. Ltd the AO had advanced verbatim same arguments to hold the assessee to be only dealer in shares so as to deny exemption u/s 10(38). Copies of the appellate and assessment order of S.K. Sonthalia Securities Pvt. Ltd were also filed before Id. CIT(Appeals).

3.1. It was further submitted that the issue of assessment of gains realized on transfer of shares either as capital gain or as business income has been decided by the Jurisdictional Calcutta Benches of ITAT in several cases. It was submitted that in the following cases the Tribunal has held that if the assessee has accounted shares in its books as investments and the shares are sold out of such investment portfolio then the profit is liable to be assessed as capital gain and not as business profit.

a) DCIT Vs. Reliance Trading Enterprises Ltd - ITA No.944/Kol/ 2008 dated 03.10.2009 for A.Y 2004-05 & ITA No. 2024/Kol/2008 dated 13.02.2009 for A.Y. 2005-06.

(b) JCIT Vs. Devkumar Saraf - ITA No.41 1/Kol/2009 dated 18.06.2009 for A.Y. 2005-06

c) ITO vs. Lookad Finance Leasing Ltd.- ITA No.659/KOL/08 dated 24.07.2009) for A.Y. 2005-06.

d) Coloma Commercial Co. Ltd Vs. ACIT- ITA No. 589/Kol/2009 dated 14.05.2009 for A.Y. 2006-07

e) ITO Vs. Waterloo Exports Pvt.Ltd- ITA No. 24/Kol/ 10 dated 14.05.2010 for A.Y. 2006-07

Reliance was placed on the decision of the ITAT, Mumbai Bench in the case of Gopal Purohit Vs. JCIT (29 SOT 117) which has since been upheld by the Bombay High Court.

4. Ld. CIT(Appeals) accepted the assessee's contention, inter alia, observing in para 6.1 as under :-

“6.1. On careful consideration of the facts of the case, I find force and substance in the submission of the appellant. As mentioned above, on perusal of financial statements of the appellant for several years, it is observed that the appellant is regularly holding the shares and securities both under the heads ‘investments’ as well as ‘stock-in-trade’. The method of valuation of both types of shares is different and the investment is valued at cost. The appellant has declared the capital gains regularly in its return of income and upto A.Y. 2004- 05, the contention of the appellant was accepted by the A.O. In fact, in the year under appeal, in the assessment order under the head “Nature of Business”, the A.O. himself has mentioned as “Trading in shares and securities and investment in shares and securities”. Thus, in the year under consideration, the contention of the appellant cannot be rejected merely for the reason that the appellant was also engaged in the business of trading in the same commodity. There is no bar, as per law, that a person trading in a particular commodity, can not hold the same commodity as investment. In Circular No. 4 of 2007 issued by the CBDT, it has been clarified that it is possible for a tax-payer to have two portfolios, i.e., an investment portfolio comprising of securities which are to be treated as capital assets and trading portfolio comprising of stock-in-trade, which are to be treated as trading assets. Where an assessee has two portfolios, the assessee may have income under both heads, i.e. capital gain as well as business income. In the case of appellant, it has two portfolios, i.e. investment portfolio as well as trading portfolio and that is why, it was having income under both heads, i.e., capital gain as well as business income. In view of above, I am of the opinion that the A.O. was not justified in holding that the long-term capital gain of Rs.1,79,79,275/-’ declared by the appellant is assessable as ‘income from business or profession’ u/s. 28 of the Act”.

5. Ld. counsel for the assessee reiterated the submissions made before the Id. CIT(Appeals) and pointed out that the assessee-company was holding its entire portfolio under the Investment A/c. as well as under Trading A/c. He submitted that in earlier years, the assessee's claim has been accepted. He referred to pages 23 to 28 of the paper book, wherein the copy of assessment order under section 143(3) for assessment year 2004-05 is contained. He further pointed out that Assessing Officer did not adhere to the consistency principle in

assessment year 2005-06 merely because there was amendment in law by allowing exemption to long-term capital account. Ld. counsel for the assessee further referred to pages 29 to 31 of the paper book, wherein the statement showing lower of cost or market value in case of investment in shares is contained for assessment year 2005-06 to 2007-08. With reference to this statement, ld. counsel pointed out that the assessee could have claimed loss if shares were held as stock-in-trade but he did not claim as it was holding the shares as investment. He further pointed out that the assessee had not claimed STT paid under section 88E of the Act also in respect of sale of shares held under investment portfolio. Thus ld. counsel submitted that assessee did not claim the beneficial provisions, which were applicable in case of stock held as trading asset. He pointed out that in earlier years, all the shares were sold as investment and accepted by Assessing Officer. Therefore, when the shares were sold, the nature of holding could not be altered. Ld. counsel further referred to pages 32 to 50 of paper book, wherein the assessment order in case of M/s. S.K. Sonthalia Securities Pvt. Ltd. for assessment year 2005-06 is contained, which had been passed by DCIT, Circle-12 and submitted that the assessment order in assessee's case is identical. He pointed out that in case of S.K. Sonthalia Securities (P) Ltd., Tribunal has accepted the assessee's claim. The order is contained at pages 44 to 50 of the paper book. He further pointed out that in assessment years 2006-07 and 2007-08 in the case of S.K. Sonthalia, Assessing Officer has accepted the assessee's claim in view of the decision of Tribunal and, accordingly, did not make any alteration to the returned income on this count. Ld. counsel further referred to pages 20 to 22 of the paper book regarding computation of income and tax thereon and pointed out that there were only 8 transactions in respect of 5 shares in which long-term capital gain was reflected. He relied on the order of ld. CIT(Appeals).

6. We have considered the rival submissions and have perused the records of the case. The facts are not disputed that the assessee was dealing shares as trader in shares as well as holding the shares as investment. It is not disputed that the assessee had kept both the portfolios separately and the mode of valuation of stocks held as investment and stock held as stock-in-trade was different. The investments were valued at cost and it was shown in the balance sheet only whereas stock-in-trade was valued at cost or market price, whichever was lower and the loss was, accordingly, claimed in the Profit & Loss A/c. and allowed to the assessee. In respect of shortfall in the value of investment, the assessee had not claimed any loss. This mode of accounting is not disputed. Further, it is not disputed that in respect of shares held as

investment, the STT paid by the assessee in respect of shares sold by it was not claimed under section 88E of the Income Tax Act. Thus, it was rightly pointed out by the Id. counsel for the assessee that the assessee had not claimed the beneficial provisions, which were applicable to the shares held as stock-in-trade. It is a trite law that if the assessee is holding shares as investment and as stock-in-trade separately and if this position has not been doubted in earlier years, then the same cannot be altered merely because of amendment in law in assessment year 2005-06. We find that the case of M/s. S.K. Sonthalia Securities (P) Ltd. in ITA Nos. 2054 & 2061/Kol./2008 is identical with the facts of this case, wherein the decision dated 21.08.2009 of this Tribunal has been accepted by the Department in subsequent years. In view of above discussion, we do not find any infirmity in the order of Id. CIT(Appeals) and uphold the same. Resultantly, the ground of appeal taken by the Department is dismissed.

7. At the time of hearing, no arguments were advanced in regard to Cross Objection raised by the assessee. Therefore, the same is dismissed as not pressed.

8. In the result, the appeal filed by the Revenue as well as the Cross Objection by the assessee both are dismissed.

ORDER PRONOUNCED IN THE OPEN COURT ON 28/ 12 /2011.

खुली अदालत में स्पष्ट आदेश 28/12/2011.

Sd/-

[Mahavir Singh /महावीर सिंह]

Judicial Member/ न्यायीक सदस्य

Sd/-

[S.V. Mehrotra/ (एस. भी.मेहरोत्रा)]

Accountant Member/ लेखा सदस्य

Dated : 28/ 12/ 2011

Copy of the order forwarded to:

1. M/s. Landmark Finance Pvt. Limited, Dhunseri House, 4A, Woodburn Park, Kolkata-20.
2. ITO, Ward-12(3), Kolkata, P-7, Chowringhee Square, Kolkata-69
3. Commissioner of Income-tax (Appeals)- , Kolkata
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata

(True Copy)

By Order

Assistant Registrar, I.T.A.T., Kolkata

Laha, Sr. P.S.