

(2013) 10 CAL CK 0039

Calcutta High Court

Case No: ITAT No. 126 of 2012 and ITA No. 110 of 2012

Commissioner of Income Tax,
Kolkata-II

APPELLANT

Vs

M/s. Lily Exporters Pvt. Ltd.

RESPONDENT

Date of Decision: Oct. 8, 2013

Hon'ble Judges: Tarun Kumar Das, J; Girish Chandra Gupta, J

Bench: Division Bench

Advocate: Smita Das De, for the Appellant; R.N. Bajoria, S.K. Mehta and Mr. Anurag Bajoria, for the Respondent

Final Decision: Disposed Off

Judgement

Girish Chandra Gupta, J.

The subject-matter of challenge in this appeal is a judgment and order dated 19th August, 2011, passed by the learned Income Tax Appellate Tribunal dismissing the appeal of the Revenue. The facts and circumstances of the case briefly stated are as follows:-

During the assessment year 2005-2006 short-term capital gain amounting to Rs. 1,62,05,046/- was returned by the assessee which was treated by the Assessing Officer as business profit on the ground that the purchase and sale of the shares took place in quick succession which indicates the intention of the assessee to embark upon an adventure rather than engaging in investment.

The Assessing Officer, however, allowed short-term capital gain in respect of some shares, which the assessee had as an opening balance during the assessment year 2005-2006.

2. The Assessing Officer also proceeded to impose penalty u/s 271(1)(c) read with Section 274 of the Income Tax Act for furnishing inaccurate particulars. Aggrieved by the order of the Assessing Officer, the assessee preferred an appeal. The Commissioner of Income Tax reversed the assessment. The Revenue preferred an

appeal to the Income Tax Appellate Tribunal which was dismissed by the judgment under challenge.

3. The learned Tribunal held as follows:-

After hearing the rival submissions and on careful perusal of materials available on record, it is observed that out of the total 162 lakhs of short term capital gains an amount of 159 lakhs are relating to Jubilant Orgaosis Ltd. In the case the assessee is already having shares of 045 as on 31.03.2004 in the investment portfolio and the AO had accepted the sale of the said shares as short term capital gain in the assessment order whereas the subsequent shares purchased by the assessee obtained as bonus shares has been treated by the AO as business income without assigning the reasons. Therefore, in our considered opinion the AO is not justified to treat part of the transactions in respect of some of the shares of the same company as short term capital gain and the balance as business income without bringing any material to this effect.

4. Aggrieved by the order of the Tribunal the Revenue has come up in appeal. The appeal was admitted on the basis of the following questions put toward by the Revenue:-

i) Whether on the facts and in the circumstances of the case the Tribunal was justified in law in directing the Assessing Officer to treat the surplus of Rs. 1,62,05,046/- earned by the assessee on sale and purchase of Shares as short term capital gains instead of business income?

ii) Whether on the facts and in the circumstances of the case the Tribunal was justified in law to delete the imposition of penalty u/s 271(1)(c) of the said Act to the tune of Rs. 42,35,593/- ?

5. Ms. Das De, the learned Advocate appearing for the appellant/Revenue did not seriously dispute the findings of the learned Appellate Tribunal. Mr. Bajoria learned Senior Advocate appearing for the assessee drew our attention to the judgment in the case of [Commissioner of Income Tax Vs. Sridev Enterprises](#), for the following propositions:-

Consistency and definiteness of approach by the Revenue is necessary in the matter of recognizing the nature of an account maintained by the assessee so that the basis of a concluded assessment would not be ignored without actually reopening the assessment. The principle is similar to the cases where it has been held that a debt which had been treated by the Revenue as a good debt in a particular year cannot subsequently be held by it to have become bad prior to that year.

6. The next judgment cited by Mr. Bajoria is in the case of [The Commissioner of Income Tax-25 Vs. Gopal Purohit](#), wherein the following view was taken:-

The Tribunal held that there ought to be uniformity in treatment and consistency when the facts and circumstances are identical, particularly in the case of the assessee. This approach of the Tribunal cannot be faulted.

7. Lastly, Mr. Bajoria relied upon a judgment in the case of [Commissioner of Income Tax, Ahmedabad Vs. Reliance Petroproducts Pvt. Ltd.](#), for the following propositions:

Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty u/s 271(1)(c). A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars.

8. Considering the facts and circumstances of the case and the settled position in law, we find no infirmity in the order of the Tribunal. No question of law has, in fact, been raised.

9. The questions framed at the time of admission of the appeal are, however, answered in the affirmative. The appeal is thus disposed of.