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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 1135/2010

COMMISSIONER OF INCOME TAX Appellant
Through: Ms. Prem Lata Bansal, Advocate

versus

ROHIT ANAND Respondent
Through: Mr. Salil Kapoor, Advocate with
Mr. Sanat Kapoor and Mr. Ankit
Gupta, Advocates.

% Date of Decision: 16th August, 2010

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | |
| 2. To be referred to the Reporter or not? | No. |
| 3. Whether the judgment should be reported in the Digest? | No. |

MANMOHAN, J

1. The present appeal has been filed under Section 260A of Income Tax Act, 1961 (for brevity “Act, 1961”) challenging the order dated 23rd June, 2009 passed by the Income Tax Appellate Tribunal (in short “Tribunal”) in ITA No. 1915/Del/2009, for the Assessment Year 2006-2007.

2. Ms. Prem Lata Bansal, learned counsel for the Revenue submitted that the Tribunal had erred in law in holding that the profit earned by the respondent-assessee on sale of shares was assessable as capital gain and not as profit and gains of business. Ms. Bansal further



submitted that the Tribunal was not correct in holding that the sl transactions carried out by the respondent-assessee were not with an intent to deal in shares.

3. However, upon a perusal of the impugned order, we are of the opinion that no substantial question of law arises in the present proceedings inasmuch as both the Commissioner of Income Tax (Appeals) and the Tribunal have given cogent reasons in arriving at the conclusion that the respondent-assessee was not a trader in stock but only a investor and further his income on sale of shares was not business income. In fact, the Tribunal in its impugned order has observed as under:-

“9. We have carefully considered the relevant facts and the findings of both the authorities below. The assessee in his individual carries on business of jewellery. Apart from said business, the assessee invested in shares and treats shares as investment in his books of account. This itself manifest the intention of the assessee as to whether he proposed into dealing in shares or earn dividend and profit out of such investment. The Assessing Officer was guided more because of the total amount involved rather than the actual intention and the way of carrying on share transaction. There is no doubt that even a single transaction can be in the nature of trade but the assessee has demonstrated that his intention was never to trade in shares. The intention is manifested by treatment given to such investment that the investment is out of own fund and not borrowed that the investment is not rotated frequently, that the total number of transactions are very few, that all the shares purchased are not sold and rather held for quite number of days. It is to be noted the Income Tax Act itself has provided that when the shares are held for a period of one year or more will be treated as long term capital asset contrary to other assets where the holding period to treat such asset a long term is more than 36 months. Thus even after holding the shares for more than 12 months and showing such intention from the conduct, the Assessing Officer cannot replace his opinion for that of the assessee in holding that the shares are held as stock in trade and profit from which is to be assessed as business income. In all such



cases the intention is manifested by the assessee himself by his conduct and other relevant factors as considered by the learned CIT(A). It is also seen that the shares were treated as investment in earlier year and which fact has been accepted by the Assessing Officer. The assessee has also earned huge dividend income from such shares. The Assessing officer merely because of the total volume of transaction is substantial, is guided to hold the income as business income. However, he failed to recognize that the volume of transaction includes the appreciation in shares also and such appreciation has been offered for tax. If volume of transaction is the criteria, what is to be examined is how frequently the transaction is done, whether the transaction is settled in the course of the day of trading itself or in the settlement period itself so as to avoid payment of full purchase price. Here the assessee has been holding the shares by taking delivery and making full payment for such investment. In such circumstances, the transactions are to be treated as giving rise to the capital gain and cannot be branded as trading of making investment so as to determine whether the transaction was for dealing in shares or making investment for earning dividend and appreciation from such investment. The total number of shares dealt in respect of long term portfolio is only 5. This cannot be considered as volume transaction. Therefore, this transaction in shares cannot be said to be with intention to deal in such shares. Rather the transaction were with intention of earning appreciation from such shares. Therefore, the same are assessable as capital gain and not as profits and gains of business. We, therefore, uphold the orders of the learned CIT(A).”

4. In our opinion, the factual findings of the final fact finding authority are neither perverse nor contrary to record. Accordingly, we find that no substantial question of law arises in the present appeal.

5. Consequently, the appeal is dismissed *in limine* but with no order as to costs.

MANMOHAN, J

CHIEF JUSTICE

AUGUST 16, 2010

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