



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

+ **ITA No. 588/2011**

% **Date of Decision: 31<sup>st</sup> March, 2011**

**THE COMMISSIONER OF INCOME TAX DELHI-II,  
CENTRAL REVENUE BUILDING,  
NEW DELHI**

**... APPELLANT**

*Through:* Mr. Sanjeev Sabharwal, Advocate.

*Versus*

**JUBILANT SECURITIES PVT. LTD.  
15<sup>TH</sup> FLOOR, DEVIKA TOWERS,  
NEHRU PLACE, NEW DELHI**

**... DEFENDANT**

*Through:* None.

**CORAM:**

**HON'BLE MR. JUSTICE A.K.SIKRI  
HON'BLE MR. JUSTICE M.L.MEHTA**

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2. To be referred to Reporter or not?  | YES |
| 3. Whether the judgment should be reported in the Digest?                    | YES |

**A.K.SIKRI, J. (Oral)**

1. The question raised in this appeal is as to whether profit on sale of share was capital gain or business income of the



assessee. The assessee had shown the same as long term capital gain, which was not accepted by the Assessing Officer, who treated it as business income. The CIT(A) as well as the ITAT has held it otherwise.

2. The main reason because of which the Assessing Officer treated the income from sale of shares as business income was that the assessee was in the business of sales/purchase of shares. Certain other income from the sale of shares was shown as business income. The CIT(A) while reversing this order of the Assessing Officer and treating the profits on sale of shares as capital gain found that the shares in question were of Jubilant Oranosys Ltd (JOL). 96200 shares of this company were purchased by the assessee in the year 2000-01 and were shown under investment portfolio. The assessee received additional 3956 shares on merger of Aniochem India Ltd. with the assessee in that year. These shares were also shown under investment portfolio. Subsequently, in the financial year 2002-03 and 2003-04 assessee received 4,39,750 shares of JOL as split/gift/bonus. In this manner, assessee was holding 5,38,106 shares of JOL on 1<sup>st</sup> April, 2004. These shares were never treated as stock in trade but from very beginning they were shown under investment



portfolio. After detailed analysis of the fact, the CIT(A) relied upon the findings of the fact that the assessee was maintaining two separate portfolio accounts, one for the purpose of investment and other for business purposes. Insofar as shares in question are concerned, they were purchased with predominantly intention of investment. The objective was to clear these shares securities as investment and enjoy the income there from and not to hold these shares as stock in trade with the intention to trade in them. Before the CIT(A) arrived at the aforesaid findings he pose following three questions:-

- “1. What was the objective of acquiring the shares? Whether objective was to acquire shares/securities as an investment and enjoy income there from or to make profit by buying and selling shares in the short run.
  2. The period for which shares have been held.
  3. The frequency of the transactions.”
3. Answers to these questions were found in favour of the assessee. In the process, the CIT(A) perused the balance sheet as well as accounts showing two portfolio i.e, as investment and as stock in trade. It was also found that the explanation of the shares held by the assessee into two portfolio had only been disputed by the Revenue. The



assessee, even otherwise, entitled to have these two portfolios as per given Accounting Standard 13 issued by the Institute of Chartered Accountants of India on 'Accounting for Investments' which provides that the company is required to value its 'short term investments' i.e. investment which have been made with a view to resell at a profit in a short period of time at cost or fair market value whichever is lower, whereas long term investments are required to be valued at cost, unless there is a permanent diminution in their values.

4. Such a practice was even in consonance with the judgments of the Apex Court and the High Courts. After a detail analysis of the facts and having regard to the legal principals in mind, while holding that profit on sale of shares of JOL was assumable as capital gain, the CIT(A) took note of the following factors.

- “1. The promoters of the appellant were also co-promoters of the JOL. The appellant has been a substantial shareholder in JOL since 2000-01. The shares in JOL were acquired as part of promoter holding which is evident from web page of NSE submitted at page 22 of the paper book.

2. Substantial part of shareholding of the appellant in JOL has resulted from shares received on account of bonus/gift/merger and not on account of purchase made by the appellant.

3. The shares of JOL have been valued at cost by the appellant in the profit and loss account



which has not been objected to by the statutory auditors/RBI.

4. The Sale of shares of JOL in the captioned assessment year was made out of investment portfolio and not out of stock in trade.

5. Sale proceeds of the shares have not been reflected as turnover and profit derived been show as profit on sale of investment.

6. The appellant has held all his investment for long period with an objective of earning dividend income therefrom.

7. The appellant had even converted the shares of JOL held as stock in trade into investment in the immediately succeeding assessment year, i.e. 2006-2007, which further fortifies the conduct of the appellant to hold the shares as investments.”

5. View taken that two portfolios can simultaneously be maintained is supported by the following reasons:-

“Further, in my considered view, nothing prohibits the appellant from simultaneously holding some shares of on investment account and some others as stock in trade. The Madras High Court in the case of CIT v. N.S.S. Investments P. Ltd. 277 ITR 149 while dismissing appeal question referred by Revenue that whether the Tribunal was right in holding that the profit on sale of shares was to be treated as capital gains observed as under:-

“A company can hold some shares as stock-in-trade for the purpose of doing business of buying and sale of such shares, while at the same time it can also hold some other shares as its capital for the purpose of earning dividend income. Here the shares in question were held as the assessee’s capital and not as in-trade. Hence, there would be capital gain and not business income. Hence, we answer the question referred in



the affirmation, i.e., in favour of the assessee and against the Department”  
(emphasis supplied)

The CBDT has vide Circular No. 4/2007 dated 15.6.07, clarified that an assessee can hold shares on both portfolios as an investment or stock on trade on the following words:

“10. CBDT also wishes to emphasize 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 a 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 i.e. capital gains as well as business income”

6. The ITAT went into the entire gamut with the dispute all over again and accepted the aforesaid findings of the CIT(A). It took note of the judgment of Gujarat High Court in **CIT v. Reqashanker A Kothari** 283 ITR 338 wherein the High Court has given a few broader tests for determining the nature of transaction. These tests are as under:-

“(a) The first test is whether the initial acquisition of the subject matter of transaction was with the intentions of dealing in 6<sup>th</sup> term, or with a views to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guidance.

(b) The second test why and who for what purpose of the sale was effected subsequently.

(c) The third test is as to how the assessee dealt with the subject matter of transaction during



the time and assets was with the assessee, whether it has been treated a stock in trade or been shown in the book of accounts of account and balance sheet as an investment. This inquiry, through relevant, is not conclusive.

(d) The fourth test is how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. The factor, though not conclusive, can afford goods and cogent evidence in judge the nature of transactions and would be a relevant circumstances to be considered in the absence of any satisfactory explanation.

(e) The fifth test, normally applied in case of firms and companies is whether the deed of partnership or the memorandum of association, as the case may be, authorizes such an activities.

(f) The most important test is as to the volume, frequency, continuity and regularity of transactions of purchases and sale of the goods, concerned in a case where there is a repetition and continuity, coupled with the magnitude of the transactions, bearing reasonable proportion to the strength of holding, an inference can readily be drawn that the activity is in the nature of business.”

7. Applying these tests to the facts of this case, the Tribunal concluded as under:-

“With the assistance of Id. Representative we have gone through the pages NO. 55-56 of the paper book wherein assessee has placed on record the details of shares held as investment starting from 15<sup>th</sup> July, 2000 upto 31<sup>st</sup> March, 2005 and the details of shares held in stock starting form 20<sup>th</sup> July, 2001 upto 31<sup>st</sup> March, 2005. From perusal of these details it would reveal that in the beginning assessee had made



investment only in the shares because it is one of the promoters of JOL. Thereafter certain shares were acquired as a stock in trade and a large number of shares were received by it as a gift or on account of merger or other companies. Right from the very beginning it has been valuing its shares held in the investment account on cost basis and not on the basis of cost or market value which is lower at the end of relevant accounting year. This valuation at the close of the accounts at a particular year is in consonance with AS-13 issued by the Institute of Chartered Accountant, providing, the valuation of investment. Contrary to this, AO except, raising a suspicion has not brought any evidence on record that these shares were not held in the investment portfolio. We could appreciate the apprehension of the AO to some extent if after the sale of 209500 shares during the present accounting year and number of shares held in the investment portfolio was below the shares in the stock in trade in that situation, AO may raise a suspicion that in the grab of sale of shares from investment assessee appears to have held stock in trade also. But even after sale there is still 3551841 shares available with the assessee in the investment portfolio. Ld. First Appellate Authority has considered all these aspects in details thereafter upheld the version of assessee that it has accrued only capital gain on sale of shares held as investment. We do not find any error in the order of Id. CIT(A). This appeal of the revenue is dismissed.”

8. It is clear from the aforesaid discussion that after taking into consideration the factual matrix on record, findings of facts are recorded by the two authorities below that the assessee was maintaining two portfolios, insofar as shares in JOL are concerned, they were taken as investment from the date of purchase itself and shown in investment portfolio. The profits



resulted therefrom was capital gain. Learned counsel for the appellant could not show any perversity in these findings. These are pure findings of facts. No substantial question of law arises for consideration in this appeal. Therefore, these appeals are dismissed in limine.

**A.K.SIKRI  
(JUDGE)**

**M.L.MEHTA  
(JUDGE)**

**MARCH 31, 2011**

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