



Reportable

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

+ **ITA No.137 of 2010**

% Reserved on: 11th August, 2011
Pronounced on: 18th November, 2011

THE COMMISSIONER OF INCOME TAX – II
NEW DELHI . . . **APPELLANT**

Through: Mr. Sanjeev Sabharwal, Sr.
 Standing Counsel.

VERSUS

MODERATE LEASING & CAPITAL
SERVICES LTD. . . . **RESPONDENT**

Through: Mr. Salil Kapoor, Advocate
 with Mr. Ankit Gupta,
 Advocate.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. This appeal was admitted on the following substantial question of law:

“Whether the findings of ITAT are perverse in holding that the loss on sale of shares holding as investment in the books of accounts was revenue loss and not capital loss?”



2. The respondent-assessee is a limited company and engaged in the business of leasing, investment in shares and to act as Managers to issue and offers, to give financial assistance in order and abroad, to act administrator or manager of an investment, trust, of fund, to give guarantee or other financial assistance for development of new enterprise, etc. The assessee filed its return of income for the Assessment Year in question, i.e., 2004-05 and the same was assessed under the provisions of Section 143(3) of the Income Tax Act (hereinafter referred to as 'the Act').

3. During the assessment proceedings, the Assessing Officer (AO) noted from the Profit & Loss Account of the assessee that the assessee had debited loss on sale of shares amounting to ₹1,34,06,274/- as business loss. The assessee was asked vide order sheet entry dated 14.9.2005 to give the details of this loss and to explain why it should not be treated as capital loss in view of the fact these shares have been shown as investment in the balance sheet by the assessee company for a number of years.

4. The assessee responded by submitting that it was an investment company and had been investing in shares of other companies, which was explained as its main business. Any profit and loss on sale of business loss had been accounted for business



loss and having claimed in Profit & Loss account and in support thereof relied upon some judgments. The AO, however, was not convinced with this explanation. He was of the view that even an investment company could hold shares either as stock-in-trade or as an investment. In which particular segment, the assessee was holding particular shares would depend upon the initial purchase, as that would reflect the intention of such a company. If it is a case of stock-in-trade, the Profit & Loss arising from its transfer is stated as business income or business loss and in case the shares are held as investment, then the sale thereof may result in a short-term or a long-term capital gains with indexation benefits.

Applying this principle, the assessee's contention was considered and rejected on the following grounds:-

- (i) There is no bar in law for an investment company to have shares as either stock-in-trade or as an investment. At the time of initial purchase the character of expenditure is determined by the intention of the assessee. The assessee may choose at its option to treat to purchase as investment or as stock in trade. The legal consequences of these alternatives are different. In the case it is stock in trade, the profit or loss arising from its transfer is treated as a business income or a business profit or loss arising there from has to be treated as a short term or a long term capital gains with indexation benefits. In short, if the contention of the assessee is accepted, there cannot be any income on account of capital gains in the case of investment companies who purchase shares as investment.



- (ii) In the present case, the intention of the assessee is manifest and apparent from the treatment given to these purchases right from F.Y. 1996-97. The assessee has been consistently showing these shares as investments in the balance sheets filed along with the returns of income. The assessee cannot be allowed to change its stance after 8 years for the purpose of setting off of this loss against business income. In fact and in law, this is precisely what is prohibited in the provisions relating to set off of losses.

Apart from the reasons given above, the assessing officer pointed out many circumstantial evidences which according to him went against the assessee's contention, and enumerated these circumstances as under:-

- (i) In the balance sheet of the assessee, the assessee has shown this 505900 equity shares of ₹ 10/- each fully paid to M/s SBEC Sugar Ltd. as investments and not as stock in trade in the current assets.
- (ii) These shares were purchased on 27.01.1997 and are only being sold for the first time in F.Y. 2003-04. In the interregnum period from 1997 to 2004, there was no transaction of sale of these shares.
- (iii) The assessee company M/s Moderate Leasing and capital Services Ltd. is a group company of Modi Group. It is a known business practice of the promoters to make investments in public limited companies through group investment companies. M/s SBEC Sugar Ltd. whose shares have been sold is also one of the group companies of Modi Group of Companies.
- (iv) The memorandum and articles of association of the company shows investment in shares as the main objects.



5. The assessee preferred the appeal against the aforesaid assessment order passed by the Assessing Officer but was unsuccessful in the said appeal as the CIT (A) affirmed the order of the Assessing Officer and dismissed the appeal. However, on further appeal by the assessee to the ITAT, the assessee has succeeded and the ITAT while allowing the appeal has treated the gain from the sale of shares as income as business income.

6. The reading of the impugned order of the Tribunal would reflect that the Tribunal first discussed the legal position as stated by the Supreme Court in the case of **Janki Ram Bahadur Ram Vs. Commissioner of Income Tax** (1965) 57 ITR 21 and culled out the legal principle therefrom by pointing out that such a question is a mixed question of fact and law. If a transaction is related to the business, which is normally carried on by the assessee, though not directly part of it, an intention to launch upon an adventure in the nature of trade may readily be inferred. A similar inference would arise where a commodity is purchased and sub-divided and sold. Such an intention may also be inferred in the case of a commercial commodity. But a transaction of purchase of land, without anything more, may not lead to the inference of embarking upon the adventure in the nature of trade.



Therefore, what has to be looked into is the intention at the time of purchases, the manner in which the shares have been dealt with and how they were treated in past and future. The Tribunal thereafter discussed the ratio of the Supreme Court judgment in the case of ***Patiala Biscuits Manufacturers Pvt. Ltd. Vs. CIT*** (1971) 82 ITR 812 and ***CIT Vs. Dalmia Jain & Company Ltd. (1972) 83 ITR 438***. In the former case, the transaction was held on the capital account whereas in the later case, the loss on the sale of shares was treated as trading loss meaning thereby transaction was held as business transaction. After discussing these two cases, the Tribunal concluded that the instant case was more proximate with the decision of the Supreme Court in ***Dalmia Jain*** (supra) and the case of ***Patiala Biscuits*** (supra) were distinguishable. The conclusive part of discussion runs as follows:-

“having considered the facts of the case and rival decided cases submitted by the both parties, we are of the view that the classification of the shares in the books of the assessee may be one of the factors but not the conclusive factor as the question has to be considered in totality of the circumstances, as held in the case of Janki Ram Bahadur Ram (supra). The decision of the case of Patiala Biscuits Manufacturers Pvt. Ltd., was in respect of preference shares, where there could not have been any possibility of increase or decrease in value because of fixed rate of dividend. However, the assessee held equity shares and incurred considerable loss in this year as well as in the



immediately preceding year. Thus, it bore the risk of loss also, which makes the transaction to be in the nature of a trading transaction, especially in view of its main object of dealing in shares. All through, the losses were shown as business losses and this stand was accepted by the revenue in assessment year 2003-04. Therefore, the facts come to close the facts I the case of Dalmia Jain & Company Ltd. (supra), in which the transaction was held to be a trading transaction. Insofar as the remarks made by the auditors are concerned, the case of the learned counsel was that they were only in respect of unsold shares. However, to our mind, such remarks are also not of essence when deciding the issue. If any case, the remarks do not represent true state of affairs as in the assessment year 2008-09, surplus on the sale of these shares has been credited in the books of revenue surplus. Thus, the real question is to find out the true nature of the transaction, which is clearly discernible from the treatment given by the assessee to the sale transaction in the profit and loss accounts of three years. The revenue has already accepted this position in assessment year 2003-04 and no reason is shown to digress from the position.”

7. To put in nutshell, as per the ITAT the classification of shares as investment in the profit and loss account is not the conclusive factor though it may be one of the relevant factors. Likewise, the Tribunal has not given much credence to the remarks by the auditors in the profit and loss account on the premise that these remarks do not represent true state of affairs. The two factors which had weighed with the ITAT in favour of the assessee are:-



- (i) The sale of shares in earlier assessment year had been credited in the Revenue account by the assessee.
- (ii) The revenue had accepted this position in the assessment year 2003-04 and no reason was shown to digress from the position.

8. We are of the view that the ITAT has taken a very myopic view of the entire matter. Only because some income from the shares sold in the assessment year 2003-04 were treated as business income is taken to be the conclusive factor ignoring and side tracking all other important factors which would outweigh the aforesaid reason give by the Tribunal.

9. In the first instance, it may be noted that as per the memorandum/articles of association, investment in shares is one of the main objectives of the company. Then the shares in question held by the assessee were always shown as investment only. Even if the Assessing Officer has wrongly stated the period of 8 years for holding these shares before their sale, the fact remains that these shares remained with the company for substantial period. From the inception, the shares were treated as investment in every year till their sale in the balance sheet. While showing it in the profit and loss account, the remarks of the auditors become relevant and could not be brushed aside so



conveniently as has been done by the Tribunal. Very important fact which is glossed over by the Tribunal is that the respondent/assessee is maintaining two separate portfolios. One portfolio is investment portfolio where shares purchased are shown as investment. Other is business portfolio where share purchased are shown as stock-in-trade. Since the assessee is dealing in the business of sale and purchase of shares as well, in such a scenario when two portfolios are maintained and shares in question are shown in investment portfolio, that would be a very dominant factor disclosing the intention of the assessee as far as shares in question are concerned. When these factors are kept in mind, merely because in the previous year the sale transaction was reflected in the profit and loss account and that was not deducted by the Assessing Officer, would not be a ground to upset the findings of the Assessing Officer and the CIT (A) based on over all appreciation of facts of the case in this year which is a separate and distinct assessment year.

10. The facts of this case resemble more with the facts of the case in ***Patiala Biscuits*** (*supra*). In that case the assessee was carrying in the business of manufacturing biscuits. It purchased preference shares of another company at the time of the expansion of that company. Both the companies belonged to one



group, namely, the Dalmia Group. The assessee sold the shares leading to a loss of ₹ 4,80,985/- This was the only transaction for the assessee in dealing in shares. The Tribunal came to the conclusion that the shares were preference shares carrying a fixed rate of dividend, which could not be appreciate in value. The purchase was not made in the open market. The two companies were inter-linked with each other. And finally, this was a solitary transaction of dealing in shares by the assessee company. Therefore, it was held that the transaction was on the capital account. The Court held that the aforesaid finding of the Tribunal was not vitiated in any manner. The AO had also relied on the decision of Supreme Court in the case of CIT Vs. Dalmia Jain (supra). The facts of that case were that the assessee incurred a loss on sale of shares. It was established that the assessee was dealing in shares. In past, such losses were deducted while computing the total income. On these facts, the Tribunal as well as the High Court came to the conclusion that it was a trading loss. The Supreme Court pointed out that the question is primarily a question of fact. It was not the case of the department that in arriving at its decision, the Tribunal had taken into consideration any irrelevant consideration or failed to take into



account any relevant consideration. Thus, it was held that there was no room for any interference by the Court.

11. Since the Tribunal ignored the very material and relevant aspects resulting into perversity of its findings, we accordingly answer the question in the affirmative i.e. in favour of the Revenue and against the assessee holding that the shares in question were held as investments and loss on the sale thereof was capital loss and not Revenue loss. The impugned order of the Tribunal is set aside. This appeal is allowed.

12. No order as to costs.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

NOVEMBER 18, 2011

Pmc/skb