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

+ ITA 200/2012

+ ITA 201/2012

CIT

..... Appellant

Through Mr. Sanjeev Sabharwal, sr.
standing counsel

Versus

DYNAMIC CONSULTANTS PVT LTD

..... Respondent

Through Mr. S. Krishnan, Adv.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V.EASWAR

ORDER

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09.04.2012

CM No.5443/2012 in ITA 201/2012

Exemption is allowed subject to all just exceptions.

Application is disposed of.

ITA 200/2012

ITA 201/2012

These two appeals filed by the Revenue under Section 260A
of the Income Tax Act, 1961 ('Act', for short) impugn order dated



30.9.2011 passed by Income Tax Appellate Tribunal ('Tribunal', short). The appeals relate to assessment year 2006-07. It may be noticed that two separate appeals are preferred by the Revenue as there were two cross-appeals before Tribunal.

2. In the return of income, the assessee had declared long term capital gains of ₹27,38,938/- on sale of four shares, which were held for more than two years. The Assessing Officer treated the gain on the sale of the said shares as income from business.

3. We have examined the order passed by the Assessing Officer. It does not give or state any valid reason or ground why the shares in question should be held to be a trading asset and not an investment. The period of holding was substantial and this aspect was ignored by the Assessing Officer. The CIT(Appeals) reversed the finding of the Assessing Officer and this finding has been affirmed by the Tribunal. In view of the factual position, we do not think any substantial question of law arises with regard to treatment of income on the sale of four shares, which were held by the assessee for more than two years.



4. The Assessing Officer had also treated ₹24,77,878/-, on _____ of 12 shares as business income instead of short term capital gain.
5. The aforesaid addition was partly affirmed by the first appellate authority, who held that income from sale of shares held for less than 6 months should be treated as trading/business income. Shares, which had been held for more than 6 months should be treated as "investment" and short term capital gain.
6. Revenue and the assessee preferred appeals against the said finding recorded by the Commissioner of Income Tax (Appeals).
7. The Tribunal has decided the issue in favour of the assessee and has treated the gain of ₹24,77,878/- as short term capital gains and has not agreed with the finding given by the Assessing Officer.
8. For the sake of convenience we reproduce the submission made by the Assessee in writing before the Assessing Officer: -

"The Company Dynamic Consultants Pvt. Ltd. is a Non Banking Financial Company (NBFC) registered with Reserve Bank of India and is engaged in financing business since 1986 and management consultancy. The company has been investing its surplus funds in shares for last 20 years, which can be seen from the old



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balance sheets of the company.

The company has purchases shares only as investment and has not done any business in shares, which is evident from the number of transaction during the year and period of holding of shares. All the shares were deposited in D-mat account of the assessee company.”

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“The company has sold only 12 shares on which short term capital gains were claimed, out of that 5 shares were purchased during last financial year 2004-05 and the average period of holding of shares was 4 months. The short term transactions mainly represent either a wrong decision of buying undesirable shares or mistake through wrong information.

We have already filed the statement of capital gains with dates of transactions. We have also filed the copy of contract notes and bills in support of the transaction of capital gains.

Taking the above points into consideration we submit that our long term and short term stock market transaction should not be construed be business of the company as it does not come under any conditions or definitions of business.”

9. The Assessing Officer in the assessment order has referred to the circular issued by the CBDT on 13.12.2005, the relevant portion of which reads as under :

“Circumstances to be considered by the Assessing Officers in determining whether a person is a trader or an investor in stocks :

- i. Whether the purchase and sale of securities was allied to his usual trade or business/was incidental to it or was an occasional independent activity.



- ii. Whether, the purchase is made solely with the intention of resale at a profit or for long term appreciation and/or for earning dividends and interest.
- iii. Whether scale of activity is substantial.
- iv. Whether transaction were entered into continuously and regularly during the assessment year.
- v. Whether purchases are made out of own funds or borrowings.
- vi. The stated objects in the Memorandum and Articles of Association in the case of corporate assessee.
- vii. Typical holding period for securities bought and sold.
- viii. Ratio of sales to purchase and holding.
- ix. The time devoted to the activity and the extent to which it is the means of livelihood.
- x. The characterization of securities in the books of account and balance sheet as stock in trade or investment.

The assessing Officer may be cautioned that no single criteria listed above is decisive and total effect of all these parameters should be considered to determine the nature of activity.”

10. The Assessing Officer observed that the transactions were regularly entered into and the sale and purchase was not occasional but continuous; the assessee did not maintain separate books of



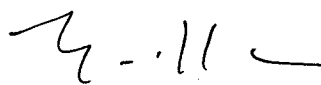
accounts for investments and regular business; and lastly
assessee had taken into account the diminution in value of
investments in the books of accounts in the assessment years 2004-
05 to 2006-07.


11. We have already extracted the reply given by the assessee
and which has merited acceptance by the Tribunal. The reply given
by the assessee was clear and categorical that the five shares had
been purchased in the last financial year and the average period of
holding in the shares in question was more than four months. There
were 12 shares and the transactions were not frequent. The
purchases were out of surplus funds. Their main business was not
trading in shares but was an occasional independent activity. The
assessee had also pointed out that the short-term transactions were
the result of either a mistake, or wrong information. The reasons
given by the Assessing Officer noted in paragraph 5 above do not
justify the plea of the Revenue that the share sold was stock-in-
trade. The assessee was not maintaining a separate heads in the
books of accounts for shares held as stock in trade or investment,
as the shares were held and treated as investment. Further, the
number of transactions, 19 in all in one year cannot be considered

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as continuous and regular. The provision for diminution in v.....
was as per the Accounting Standard 13 regarding Accounting of
Investments. The Assessing officer ignored several other aspects
and questions which have been raised and noticed and form the
basis of finding recorded by the Tribunal. The order by the Tribunal
therefore does not require any interference. The appeals are
accordingly dismissed.


SANJIV KHANNA, J


R.V.EASWAR, J

APRIL 09, 2012
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