



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

Decided on: 12.03.2014

+ **ITA 97/2014 & C.M. APPL. 4132/2014 & 4133/2014**
MANOJ KUMAR SAMDARIAAppellant

Through: Sh. Vikas Jain, Advocate.

Versus

COMMISSIONER OF INCOME TAX-IRespondent

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

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The appellant- hereafter called “the assessee” impugns an order of the Income Tax Appellate Tribunal (“ITAT”) dated 05-10-2012 whereby the latter allowed the revenue’s appeal and upset the order of the Commissioner of Income Tax (Appeals). It is argued that having regard to the circumstances, the substantial question of law is that the Tribunal fell into error in holding that the profit derived from the sale of shares for AY 2007-08 was not short term capital gain, but business income.

2. In the return, the assessee, for the year 2007-08 claimed that ₹ 65,45,321/- had to be treated as short term capital gain, on account of sale of shares. The Assessing Officer noted that the assessee provided the funds to M/s Vimgi Investments Pvt. Ltd to trade in shares on his behalf, which is supported by the brokers notes and confirmed copy of the account of the broker filed by the assessee by letter dated



10.8.2009. Since the broker had traded on behalf of the assessee, practically on day-to-day basis, the Assessing Officer observed that the appellant is engaged in the activity of sale/purchase of share. Therefore, the AO show caused the assessee why the profit of ₹65,45,321/- should not be assessed as business income against the income shown as short term capital gain. By reply dated 13.11.2009 the assessee contended that the income was shown as short term capital gain because of transfer of short term capital asset as per section 111A, and that all the shares were received and transferred through DEMAT account and that STT was paid on all such transaction of sale and purchase of shares.

3. The assessee's contention was not acceptable to the Assessing Officer on the ground that section 111A prescribes the mode of computation of tax liability and had no relevance in deciding the nature of share transactions, i.e. whether they were taken for investment purpose or for business purpose. Thereafter, following Instruction No.1827 dated 31.6.1989 and supplemented by another Circular No.4/2007. dated 15.6.2007, the AO determined that the amount was business income, and treated it as such in the assessment order. The assessee felt aggrieved. The CIT (A) allowed the appeal, recording as follows:

“5.3 The following facts support the appellant's intention that the shares are held for investment purpose-

- a) The Assessee is in the business of exporting jewellery and handicrafts goods*
- b) The Assessee has not borrowed any funds for carrying the shares transactions.*



- c) *The Assessee has earned dividend income of Rs. 21.952 in the previous year 2006-07.*
- d) *The average length of the ownership of shares purchased through Vimgi Investments Pvt. Ltd, is 118 days and Navratan Capital & Securities Limited is 48 days.*
- e) *The number of scrips are less than 25.*
- f) *The Assessee has no infrastructure in the form of office employees, equipments etc. The Assessee has not indulged in advertising or canvassing etc.*
- g) *The Assessment as made in earlier year though there is no major change in the facts of the case or the law.*

5.4 Further I have also referred to the Hon'ble Bombay High Court judgment in the case of CIT vs. Gopal Purohit. The judgment also throws the same view and is also upheld by the Apex Court.

Thus, in view of the aforesaid discussion, the view opined by the AO is rejected and direct him to recompute the income under the head capital gains and not under the head business income and pass a consequential order accordingly.”

4. The revenue approached the ITAT contending that a proper application of the law to the facts of the case revealed that the sums used to derive the income in question were not investments but clearly for business purposes and therefore they had to be treated as such. The ITAT, in its impugned order, by the operative portion, allowing the revenue's appeal, held as follows:

“5.6 In the instant case, the assessee has been habitually trading in quoted shares and the frequency of such purchases and disposal as also the fact that with the investment of ₹ 1 crore in shares, the assessee had turnover of over of ₹ 1 crores indicates nothing but



intention of trade. It may be pointed out that the assessee earned only a meager amount of dividend of ₹ 21,952/- in the year under consideration. A trader in a commodity is basically motivated by profit in selling the commodity on each and every rise in value, which is apparent in the instant case. High frequency, high volume and regularity of transactions are therefore the basic features of a trading transaction. An investor on the other hand makes purchases with a view to earning income from the investments. He is not tempted to sell the commodity to earn quick profit on each and every rise in the value and holds the commodity for a longer period so as to have income as well as appreciation in value. The Ld. CIT(A) pointed out that the assessee has not borrowed any funds for carrying the shares transactions. In our opinion, this is not the crucial factor to ascertain as to whether or not the assessee was an investor in shares or trader. Though the number of scrips is less than 25 as pointed out by the Ld. CIT(A) but the period of holding and the ratio of turnover and stock reflects that the assessee had the predominant intention of trading in shares. As already stated, the true nature of transaction can be understood from the intention of the assessee at the time of purchase. Crucial factor is the period of holding which is very short in case of a trader as is in the instant case, because a trader buys the commodity not for holding it in contrast to an investor who buys the commodity for holding it so as to earn some income from investment and have decent appreciation. In case of shares, income is in the form of annual dividend and therefore, an investor in shares will normally be holding shares for more than a year and any sale before one year has to be explained from the circumstances of the case. The profit motive is also relevant but this is also not conclusive because even an investor may earn profit by way of appreciation. As is apparent from the aforesaid facts, the transactions of purchase of shares, and thereafter selling it within few days and most of the time within a month, with a view to earn profit, reflects motive



of the assessee as a trader and not an investor. In the instant case, purchases as well as turnover are continually increasing and the assessee has regularly dealt in purchase and sales of shares. Profit motive is also clearly evident in making the transaction. In Gopal Purohit (supra), the assessee has been continually holding the shares as investment from year to year. This is not the situation in the instant case. In the case of CIT (Central). Calcutta vs Associated Industrial Development Company (P) Ltd., 82 ITR 586, the Hon'ble Supreme Court held as under:

"Whether a particular holding of shares is by way of investment or forms part of the stock-in-trade is a matter which is within the knowledge of the assessee who holds the shares and he should, in normal circumstances, be in a position to produce evidence from his records as to whether he has maintained any distinction between those shares which are his stock-in-trade and those which are held by way of investment."

5.7 In the case of CIT, Bombay vs H Holck Larsen (160 ITR-67), the Hon'ble Supreme Court has held as under:

"In order to determine whether one was a dealer in shares or an investor, the real question was not whether the transaction of buying and selling the shares lacks the element of trading, but whether the later stages of the whole operation show that the first step - the purchase of the shares - was not taken as, or in the course of, a trading transaction. The totality of all the facts will have to be borne in mind and the correct legal principles applied to these. If all the relevant factors have been taken into consideration and there has been no misapplication of the principles of law, then the conclusion arrived at by the Tribunal cannot be interfered with because



the inference is a question of law, if such an inference was a possible one subject however, that all the relevant factors have been duly weighed and considered by the Tribunal, the inference reached by the Tribunal should not be interfered with."

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..... 6. In view of the foregoing, we are of the opinion that the character of a transaction cannot be determined solely on the application of any abstract test or rule and the cumulative factors affecting the transactions have to be seen. Habitual dealing in a particular item is indicative of the assessee's intention of trading. Merely for taking benefit of provisions of sec. 111A of the Act applicable from the AY 2005-06, the assessee cannot be categorised as an investor especially when the aforesaid facts speak otherwise and lead us to the conclusion that the assessee is indulging in activities of a trader in shares. As observed in Sulej Cotton Mills Supply Agency Ltd- (supra), it is a manner of first impression with the Court whether a particular transaction is in the nature of trade or not. ; it is not even the assessee's case that they had held all the shares for a long duration. The facts and circumstances of the case before us, when viewed in the light of principles laid down in the various decisions referred to above, lead us to the conclusion that the voluminous share transactions were in the nature of the business; purchase of shares by them was not for the purpose of earning dividend, but with the dominant intention of resale in order to earn profits; the profit made by the assessee is not of mere enhancement of value of the shares, but is a profit made in the carrying on of a business scheme of profit making; huge volume of share transactions, the repetition and continuity of the transactions, give them a flavour of "trade": the magnitude, frequency and the ratio of sales to purchases on the total holdings is evidence that the assessee had not purchased the shares as an investment,



but with the intention to trade in such scrips. In the light of view taken in the aforesaid decisions, we are of the opinion that the ld. CIT(A) was not justified in accepting the claim of the assessee as investor in shares. Accordingly, we vacate the findings of the Ld. CIT(A) and restore the order of the AO..”

5. It is argued that the ITAT erred in interfering with the findings of fact arrived at by the Appellate Commissioner. It was submitted in this context that as one possessed of means, it was certainly open to the assessee to seek growth of its funds; to achieve that object it invested through two brokers. A proper application of all tests showed that the income was derived through short term capital gains. The funds belonged to the assessee; its business was not in shares or investments, it kept separate investment accounts. Urging that in view of these circumstances, the findings of the CIT (A) were reasonable, counsel stated that the ITAT should not have interfered with his order, as it was based on plausible reasoning.

6. In *CIT v. Associated Industrial Development Co.(Ltd.)* (1971) 82 ITR 586 (SC), the Supreme Court observed as follows:

“3.....it was open to the assessee to contend that even on the assumption that it had become a dealer and was no longer an investor in shares the particular holdings which had been cleared and the sales of which had resulted in the profit in question had always been treated by it as an investment. It can hardly be disputed that there was no bar to a dealer investing in shares. But then the matter does not rest purely on the technical question of onus which undoubtedly is initially on the revenue to prove that a particular item of receipt is taxable. Whether a particular



holding of shares is by way of investment or forms part of the stock-in-trade is a matter which is within the knowledge, of the assessee who holds the shares and it should, in normal circumstances, be in a position to produce evidence from its records as to whether it has maintained any distinction between those shares which are its stock-in-trade and those which are held by way of investment.”

P.M. Mohammed Meerakhan v. Commissioner of Income-tax, Kerala, (1969) 73 ITR 735 (S.C.) is another ruling of the Supreme Court that reiterates that it is not possible to evolve any single legal test or formula which could be applied in determining whether a transaction was an adventure in the nature of trade or not. The answer to the question must necessarily depend in each case on the total impression and effect of all the relevant factors and circumstances proved therein and which determine the character of the transaction. Likewise, in *Raja Bahadur Kamakhya Narain Singh v. CIT, Bihar and Orissa* (1970) 77 ITR 253 (SC), the question of adventure in the nature of trade was again considered by the Supreme Court and which reiterated that since the expression "*adventure in the nature of trade*" implied the existence of certain element in the transactions which in law would invest these with the character of trade or business and the question on that account became a mixed question of law and fact, the court could review the Tribunal's findings if it had misdirected itself in law. It was fairly clear that where a person in selling his investment realised an enhanced price, the excess over his purchase price was not profit assessable to tax as income, but it would be so, if what was done was not a mere realisation of the investment but an act done for making



profit. The distinction between the two types of transactions is not easily discernable. Whether the transaction is of one kind or the other depends on the question whether the excess is an enhancement of the value by realising a security or a gain in an operation of profit-making. The assessee might invest his capital in shares with the intention to resell these if in future their sale results in a higher price. Though motivated by a possibility of enhanced value, such investment does not necessarily render the transaction in the nature of trade.

7. In the present case, the Tribunal considered all the relevant decisions, and indicated the tests applicable, correctly. It took note of the Circular (No. 4 of 2007) which, in turn encapsulates the law on the subject, and after analysing the nature of the transactions, i.e the duration of holding, the proportion of income derived as dividend, to the investment made, found that the income was by way of business or trade in shares. This court is of opinion that there is nothing perverse or unreasonable in the finding of the ITAT. The turnover of the shares was about ₹ 1 crore; the dividend earned for the period was only ₹ 21,952/-. The income or profits gained from sale of shares was to the tune of ₹ 65,45,321/-. Granted that the main line of business or commercial activity of the assessee was not share trading and he did not have a separate infrastructure or expenditure to support such trade; yet the volume of transaction in even the 25 scrips that were sold and purchased, coupled with the duration of holding – both commented upon by the AO and the ITAT, went a long way in establishing that the intention behind these transactions was to derive business income



or profit, and not to invest the amounts. It would be worth noticing the AO's observations, in this regard:

“As per the details given by the assessee himself, the assessee made opening investment of RS1,00.00,000 /. in shares which is an huge amount and during the year, shares of Rs4.10 cr have been sold and shares of Rs4.90cr have been purchased. This also shows that the volume and magnitude of the share transactions carried out during the year.

On examining the aseessees demat a/c. broker's statement and brokers note from the angle of period of holding of the script it is noted that the assessee was selling the shares very frequently and average period of holding of scrips stands at around one month. This was also proved from the working sheet of computation of short term capital from the sale/ purchase of shares, filed by the assessee vide letter dated 10-08-2009. This proves that sale and purchase transactions of shares were made not for investment purposes but for business purposes.”

8. Having regard to the above facts, this Court is of opinion that there is no infirmity with the findings and order of the ITAT, impugned in the present appeal. The question of law framed is answered against the assessee/appellant and in favour of the revenue. The appeal consequently fails and is dismissed. The pending applications are disposed off as infructuous.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

MARCH 12, 2014