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

\+ **INCOME TAX APPEAL NO. 1234/2011**

Reserved on: 27th March, 2012

% **Date of Decision:** 12th April, 2012

BHARTI GUPTA RAMOLA ...Appellant
Through Mr. Prakash Kumar, Advocate.

VERSUS

COMMISSIONER OF INCOME TAX .....Respondent
Through Ms. Suruchi Aggarwal, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.:

Bharti Gupta Ramola has preferred this appeal, which relates to assessment year 2006-07 against the order dated 31st May, 2011 passed by the Income Tax Appellate Tribunal (tribunal, for short) in ITA No. 5561/Del/2010. By order dated 29th November, 2011, the following substantial question of law was admitted:

> "Whether the Income Tax Appellate Tribunal was right in holding that the assessee had not held the shares/mutual fund instruments for not more than 12 months preceding the date of transfer?"

2. The facts are undisputed. The appellant is an individual and had income from salary and other sources. The appellant had made investments and had also earned income as long term and short term capital gains on mutual fund instruments and securities.

3. During the financial year 2005-06, the appellant had sold two mutual fund instruments on 29th September, 2005 and 14th October, 2005 and had shown the income earned as long term capital gains of Rs.18,31,241/- and Rs.2,72,386/- respectively. The aforesaid mutual fund instruments/units were purchased by the appellant assessee on 29th September, 2004 and 14th October, 2004.

4. In the return of income filed by the appellant on 31st July, 2006, the appellant treated gain of Rs.18,31,241/- as exempt under Section 10(38) of the Income Tax Act, 1961 (Act, for short) as STT was paid. The gain of Rs.2,72,386/- was also treated as long term capital gain and claimed to be

exempt under Section 54EC of the Act. The Assessing Officer in the assessment order treated the two gains as short term capital gains on the ground that the instruments had not been held for a period of more than 12 months immediately preceding the date of transfer.

5. In the first appeal, the assessee succeeded and it was held that the instruments were held for 12 months and the gains were, therefore, not short term capital gains. Revenue preferred an appeal and by the impugned order has succeeded before the tribunal. The findings of the Assessing Officer has been restored.

6. In order to appreciate the controversy and to answer the substantial question of law mentioned above, we are required to examine and interpret Section 2(29A) and Section 2(42A) of the Act, which read as under:

> "2. Definitions.--In this Act, unless the context otherwise requires,--
>
> (29A) "long-term capital asset" means a capital asset which is not a short-term capital asset ;
>
> xxx
>
> (42A) "short-term capital asset" means a capital asset held by an assessee for not

> more than thirty-six months immediately preceding the date of its transfer:
>
> Provided that in the case of a share held in a company or any other security listed in a recognised stock exchange in India or a unit of the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963), or a unit of a Mutual Fund specified under clause (23D) of section 10 or a zero coupon bond, the provisions of this clause shall have effect as if for the words "thirty-six months", the words "twelve months" had been substituted:"

7. The contention of the Revenue, which has been accepted and forms edifice of the reasoning given by the tribunal, is that the asset must be held for a period of more than 36 months or 12 months plus one day i.e. the date when the transfer is made. The date on which the transfer is made has to be excluded. The aforesaid submission is made on the basis of the language of Section 2(42A) and the words "more than" used therein along with the expression "immediately preceding the date of transfer".

8. Having heard and deliberated upon the issue, we feel that the stand of the appellant assessee should be accepted. A careful examination of the aforesaid Section would reveal that the date of transfer or sale is treated as a cut off point, to

apply the test. The expression "immediately preceding the date of transfer" is a cut off point for determining and deciding the period during which the asset was held by an assessee. The said expression does not and should not be interpreted to mean that the date of transfer itself should be added or excluded.

9. The first part of Section 2(42A) stipulates that if an asset is held for 36/12 months, it will be a long term capital asset. The term "month" has not been defined in the Act and, therefore, we have to fall back and can rely upon the word "calendar month" as defined in the General Clauses Act, 1897. Section 3(35) of the said Act defines a "month" to mean a month reckoned according to the British calendar. In normal course, therefore, period of 12 calendar months would begin on the specified day when the asset was transferred and the assessee became the holder of the asset and end one day before in the relevant calendar month, next year. Thus, if an assessee acquires an asset on 2nd January in a preceding year, the period of 12 months would be complete on 1st January, next year and not on 2nd January. This position is true and will apply to all cases, except when an asset is

transferred/purchased on 1st January. In such cases, the period of one year or 12 months would expire and would be complete on 31st December in the same year. The expression used in Section 2(42A) is "for not more than 12 months". In other words, to qualify as a short term capital asset, the capital asset should be held by the assessee for 12 or 36 months, but the moment the said time limit is crossed or is exceeded and the assessee continues to be the holder/owner of the said asset, the same is to be treated as a long term capital asset.

10. We are conscious that in some decisions the expression "not less than" has been interpreted to mean a clear period, excluding the date of service (see ***Chambers versus Smith***, 67 Revised Reports 231, ***In re Railways Sleepers Supply Company***, [1885] 29 Ch.D. 204 (3), ***Mcqueen versus Jackson***, 1903 (2) KB 163, etc.). However, the said cases were where the legislature had fixed time limit, which should not be less than the prescribed days for complying with the requirements of law or to furnish reply. In such circumstances, it has been held that in computation of time, fraction of a day should not be reckoned (see In ***re Hector Whalling Limited***, 1935 All

England Reporter, 302 (1936 Ch. 208). Even under the Income Tax Act, 1922, the stipulation not less than 30 days in Section 22(2) was interpreted in ***Commissioner of Income Tax Versus Ekbal and Company***, AIR 1945 Bom 316 to mean 30 clear days. This expression was distinguished from the expression within 30 days, which means within two points of time. Similar views have been expressed in ***N.V.R. Nagappa Chettiar and Another versus Madras Race Club***, AIR 1951 Mad 831, ***Anokhmal Bhurelal versus Chief Panchayat Officer Rajasthan***, ***Jaipur,*** AIR 1957 Raj 388, ***Smt. Haradevi versus State of Andhra Pradesh and Another***, AIR 1957 AP 229.

11. In T***.M. Lall versus Gopal Singh and Another***, AIR 1963 P&H 378, Rule 4 of the All India Bar Council (First Constitution) Rules, 1961 had came up for consideration. In the said rule, the expressions “not less than” and “not more than” were used. Because of the use of the said words, it was held that the provision referred to complete or entire days intervening between the two terminal days. Accordingly, fraction of day should not be taken into consideration.

12. However, in English language many words have different meanings and a word can be used in more than one

sense. Every dictionary gives several meanings to each word. We cannot mechanically apply every meaning given in the dictionary and have to choose an appropriate meaning that the word may carry in the context in which it is used in the legislation. It is the context which determines the meaning of the word (See ***P.V. Indiresan (2) versus Union of India***, (2011) 8 SCC 441).

13. It is appropriate to refer to the decision of the Supreme Court in ***Commissioner of Income Tax versus Braithwaite and Company Limited***, (1993) 201 ITR 343. In the said case, the assessee had obtained a term loan of Rs.50 lacs from a bank vide agreement dated 1st August, 1964. The loan was to be paid in five installments ending on 31st July, 1971. Question arose whether the repayment as stipulated under the agreement was during a period of "not less than" seven years as per the proviso to Rule 1(b) of the second schedule of the Companies (Profits) Surtax Tax Act, 1964. Reversing the judgment of the High Court and accepting the stand of the assessee, it was held that a fraction of a day would be counted to determine and decide whether the loan was for a

period of “less than seven years” or “more than seven years”.

It was held as under:

> “ We are of the view that on a plain reading of the proviso to rule 1(v), Second Schedule to the Act, it is clear that in order to claim the benefit of the said provision, the borrowed money has to be repaid during the period of more than seven years. The only interpretation which can be given to the expression “during a period of not less than seven years” is that the said period should go beyond seven years. The reasoning is simple. The period of seven years would not be complete till the last “minute” or even the last “second” of the said period are counted. In other words, till the last minute of the seven-year period is completed, the period remains less than seven years. In the present case, the agreement was entered into on August 1, 1964. The last instalment was to be paid on July 31, 1971. The seven years were to complete at 12 p.m. (between the night of July 31, 1971, and August 1, 1971). Even if the loan was paid back at 11.59 p.m. on July 31, 1971, the period would be less than seven years by one minute. It is, therefore, obvious that the period of “not less than seven years” can only mean till after the completion of seven years. We, therefore, hold that the repayment of the borrowed amount during the period of seven years does not mean repayment “during a period of not less than seven years”. To claim the benefit under rule 1(v) of the Second Schedule to the Act the repayment of the borrowed money must be during a period which is more than seven years.

> We find support in the view taken by us in the following cases. In Ramanasari v. Muthusami Naik [1906] ILR 30 Mad 248, section 18 of the Madras Rent Recovery Act, 1865 (VIII of 1865), required that, in fixing the day of sale, not less than seven days must be allowed "from the time of the public notice and not less than 30 days from the date of distraint". The sale was held on the 13th February, but the notice was published on 6th February. It was held that "not less than" means the same as "clear" and seven whole days must elapse between the day of the notice and the day fixed for sale. In Railway Sleepers Supply Co., In re [1885] LJ 54 Ch 720; [1885] 29 Ch 204, it was held that the expression "not less" than a given number of days means "clear days". It was held that the expression "not less" indicates "a minimum"."

14. Bombay High Court in ***Ravi versus Collector, Wardah***, (2008) 3 Maharashtra Law Journal 758 had examined the expression within a period "not more than one month" used in Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. The said words in question stipulated and envisaged that an application should be filed within a period of not more than one month "from" the date of notification of the election result. In view of the word "from", it was held that the first date had to be excluded in view of Section 10 of the Bombay General Clauses Act, 1904.

15. In the present case, what is noticeable from the language of the legislation is that the requirement prescribed is that the assessee should not hold the asset for more than 36 or 12 months. The moment an asessee exceeds this period and the holding continues beyond 36/12 months, the asset is treated as a long term asset and according the gains are computed. The clause, therefore, refers to the holding period. We do not think it will be appropriate to exclude or include any day of the holding for computing the said period. The date on which the asset is acquired is not to be excluded because the holding starts from the said date. Neither is the date of sale/transfer to be excluded. The period of 12/36 months accordingly will have to be computed. Thus, if an asset is held for 12 months/36 months and is sold the very next day after the period of 12/36 months is over, the asset would be treated as a long term capital asset. There is nothing in the said Section to show and hold that the time period would not include fraction of a day. The expression "not more than" clearly in this case would refer and include the date on which the asset is first held or acquired. Thus, an asset acquired on the 1st of January would complete 12

months at the end of the said year, i.e., on 31st of December and if it is sold next year and if the proviso to Section 2(42A) applies, it would be treated as a long term capital gains.

16. In view of the aforesaid reasoning, the question of law mentioned above is answered in negative, i.e., in favour of the appellant-assessee and against the Revenue. The appeal is allowed. In the facts of the case, there will be no order as to costs.

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(SANJIV KHANNA)
JUDGE

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(R.V. EASWAR)
JUDGE

APRIL 12, 2012
VKR