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

+ **ITA 177/2014**

% **Date of Decision:** 26th August, 2014

THE COMMISSIONER OF INCOME TAX-II Appellant
Through: Mr.Sanjeev Sabharwal, Sr.Standing
Counsel

versus

M.G.SHARE & STOCK PVT.LTD. Respondent
Through:

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (Oral)

This appeal by the Revenue in the case of MG Shares & Stock Pvt. Ltd., relates to assessment year 2006-07 and impugns order dated 8th August, 2013 passed by Income Tax Appellate Tribunal (Tribunal, for short). The issue raised is whether short term capital gains of Rs.68,06,698/- on sale of shares, should be assessed as income from business.

2. The respondent-assessee during the relevant time was a registered sub-broker with SEBI and had filed return declaring income of Rs.89,47,150/-.



3. Learned counsel for the appellant Revenue has emphasised and stressed that the respondent assessee was a sub-broker and was dealing in shares and, therefore, the shares held should be appropriately treated as stock-in-trade and income earned should be treated as business income.

4. The respondent assessee had declared income from trading in shares of Rs.21,40,752/-, long term capital gains of Rs.65,29,425/-, and short term capital gains of Rs.68,06,698/-.

5. Long term capital gains from sale of investment in shares, has been accepted and is not under challenge. The assessment order records that the respondent assessee had made investments in shares and was also a trader in shares. Thus, it is accepted and admitted that the respondent assessee was maintaining two separate portfolios; one of shares held as investment and the other of shares held as stock-in-trade. On the date of purchase, shares became part of one of the portfolios and were accordingly treated either as investment or as a stock-in-trade. The respondent assessee on the basis of the two portfolios, had declared taxable income as short term/long term capital gains or income from trading in shares. This was the position in the earlier assessment years 2004-05 and 2005-06 also.

6. In addition to the said facts, the Commissioner of Income Tax



(Appeals) and Tribunal have specifically gone into the question of magnitude of purchases and sales; frequency of transactions; ratio of sales to purchases as shown in the investment portfolio and stock in trade portfolio, period of holding and even the question whether dividend was earned or not.

7. They have held that there was very limited activity or transactions in the investment portfolio in the assessment years 2004-05, 2005-06 and 2006-07. In the three years, investments had been made in only two, five and eight companies, respectively. Eight companies in which investments were made in the assessment year 2006-07, were not sold in the said year. Contra, in the trading portfolio for the assessment year 2006-07, there were hundreds of transactions and trading was to the tune of thousands of shares in 199 companies. In the investment portfolio, in the current year shares of seven companies were sold and gains were made. There were 23 transactions of purchase in the whole year. No purchases were made in the investment portfolio in the eight months; and no sales were made in the said portfolio in six months. Further, dividend of Rs.5,91,580/- had been received. The Tribunal has also recorded that the assessee had prepared a chart disclosing the percentage of turnover on account of investment and trading in the last three years. In the assessment years 2004-



05, 2005-06, and 2006-07, percentage of turnover in shares held in investment portfolio, viz. percentage of turnover in trading portfolio was 7.03% to 92.97%, 2.23% to 97.77%, and, 44.88% to 95.12%, respectively.

8. The aforesaid factual position tilts the scale in favour of the respondent-assessee and, accordingly, we do not think that there are grounds and reasons to interfere with the impugned order. The Assessing Officer had observed that the respondent-assessee had shown income of Rs.21,40,752/- as business income from sales of shares, whereas, short term capital gains, as declared, were 68,06,698/-. This is correct but these figures, by themselves, would not justify treating the entire short term gains as business income. Business income from trading in shares can result in good profit in one year, but lower or marginal in another year because of the inherent risks involved in the business. The Assessing Officer, in the present case, has accepted that the assessee had maintained two separate portfolios; investment, and stock-in-trade portfolio for the shares. There is no allegation that the shares were transferred from one portfolio to other. The portfolios have been in existence since the assessment year 2004-05 onwards. The nature and extent of the transactions in the two portfolios have been noticed. Investment portfolios had shares of a few companies and transactions were



infrequent. Transactions in the trading portfolio were of thousands of shares in 199 companies. The ratio of turnover has also been noted. Further, substantial dividend income was earned.

9. In view of the aforesaid position, we do not see any reason to interfere with the impugned order and entertain the present appeal. The appeal is dismissed.

(SANJIV KHANNA)
Judge

(V. KAMESWAR RAO)
Judge

AUGUST 26, 2014
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