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

+ **ITA 300/2014**

Date of decision: 24th September, 2014

ACEE ENTERPRISES Appellant
Through Mr. M.P. Rastogi and Mr. K.N. Ahuja,
Advocates.

versus

COMMISSIONER OF INCOME TAX – I Respondent
Through Mr. Kamal Sawhney, Sr. Standing
Counsel with Mr. Jatin Sehgal, Advocate.

ITA 304/2014

ACEE ENTERPRISES Appellant
Through Mr. M.P. Rastogi and Mr. K.N. Ahuja,
Advocates.

versus

COMMISSIONER OF INCOME TAX – I Respondent
Through Mr. Kamal Sawhney, Sr. Standing
Counsel with Mr. Jatin Sehgal, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (ORAL)

Having heard counsel for the parties, we frame the following
substantial question of law in these appeals, which pertain to
assessment years 2007-08 and 2008-09:-

“Whether the Income Tax Appellate Tribunal was



right in dismissing the appeal of the appellant-assessee for assessment years 2007-08 and 2008-09 observing that they do not find any merit and the appellant-assessee should be treated as a trader of shares in all the assessment years without reference to the factual matrix?”

2. Learned counsel for the parties state that as a limited and short issue arises for consideration, the appeals may be disposed at this stage itself.

3. The impugned order dated 26th April, 2013 passed by the Income Tax Appellate Tribunal (‘Tribunal’, for short) related to four assessment years i.e. 2005-06, 2006-07, 2007-08 and 2008-09.

4. The Tribunal in the impugned order has referred to the facts relating to assessment year 2005-06. This was the first year, in which the appellant-assessee changed the nature of its portfolio from shares held as stock-in-trade to that of shares held as an investment. With regard to other assessment years, the Tribunal has not discussed the factual matrix or gone into the question of number of transactions relating to sale and purchase, the period for which shares were held and other relevant criteria, which have been elucidated in Circular No.4 of 2007 dated 15th June, 2007 as well as the decision of the Supreme Court in ***Commissioner of Income Tax (Central), Calcutta Vs. Associated Industrial Company Pvt. Ltd.***, [1971] 82 ITR 586 and Fidelity Northstar Fund, In Re, [2007] 288 ITR 641 (AAR), which are



mentioned in the aforesaid circular.

5. By order dated 28th July, 2014, after referring to the factual matrix of the assessment years 2005-06 and 2006-07, we had dismissed ITA Nos.301/2014 and 302/2014, but notice was issued in the present ITAs, which relate to assessment years 2007-08 and 2008-09. In these years, we notice that the Assessing Officer did not deal with the facts, but simply followed his predecessor's order for the assessment years 2005-06 and 2006-07 to hold that the transactions relating to shares treated by the appellant-assessee as short term capital gains should be taxed under the head 'Profits and gains of Business or Profession'.

6. The Commissioner of Income Tax (Appeals) also did not go in depth and detail and preferred to rely upon the earlier orders. In the first appellate order relating to assessment year 2007-08, reference was made to transactions in shares of 8 companies, which were held for a period ranging from 6 days to 97 days, but learned counsel for the appellant-assessee states that there were other shares too, which were held for longer period. For the assessment year 2008-09, there is no discussion and elucidation.

7. It is clearly noticeable that the impugned order passed by the Tribunal does not refer to the factual matrix relating to the assessment years 2007-08 and 2008-09, except for recording as under:-

“In other assessment years also, the frequency of



transactions were quite large. Learned CIT(Appeals) has reproduced the details of transactions and observed that some of the shares were kept only for one, two or three days.

.....
..... As far as other years are concerned, we do not find any merit in the appeals of assessee on this issue. The assessee has to be treated as a trader in shares in all the assessment years.”

8. We notice that the appellant-assessee had declared long-term capital gains and, therefore, the stand of the appellant-assessee is that he was an investor as well as trader in shares.

9. In view of the aforesaid factual position, we have to hold that the Tribunal has not dealt with the contentions raised after examining and ascertaining the facts in detail. Answer or conclusion has been recorded without reference to facts of the particular year. The factual position can vary and can be materially different. The question of law, therefore, has to be answered in favour of the appellant-assessee, but with an order of remand. We clarify that we have not examined the contentions of the appellant-assessee or the respondent-Revenue on merits. The appeals are disposed of.

10. To cut short delay, parties are directed to appear before the Tribunal on 3rd November, 2014, when a date of hearing will be fixed.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

SEPTEMBER 24, 2014/NA