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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **INCOME TAX APPEAL NO. 406/2013 & CM NO. 12622/2013**

Date of decision: 22nd October, 2013

COMMISSIONER OF INCOME TAX (CENTRAL)

..... Appellant

Through Mr. Sanjeev Sabharwal, Sr.
Standing Counsel & Mr. Puneet Gupta,
Advocate.

versus

M/S EXPRESS SECURITIES PVT LTD.

..... Respondent

Through Nemo.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J. (ORAL):

This appeal by the Revenue, which pertains to Assessment Year 2006-07, is delayed by 156 days. The appellant had earlier filed an appeal before the Allahabad High Court, which was withdrawn for lack of jurisdiction and now this appeal has been preferred before the Delhi High Court. Before issuing notice on the application for condonation of delay, we deem it appropriate to examine and consider the appeal on merits.



2. The assessee is a company. In the return for the year question, it had declared long-term capital gain of Rs.3,34,65,931/- and the said gain was claimed as exempt under Section 10(38) of the Income Tax Act, 1961 (Act, for short). The respondent-assessee had claimed before the Assessing Officer that they were maintaining two sets of portfolio, i.e., investment and trading portfolio and the shares, which were sold and subject matter of long-term capital gains, were held in the investment portfolio. This factual position was not disputed.

3. The Assessing Officer has recorded that as per the business activities undertaken by the assessee, they were dealing and trading in shares and financial securities in Bombay Stock Exchange, Delhi Stock Exchange and Calcutta Stock Exchange. The respondent-assessee was a registered broker with the said exchanges. The Assessing Officer held that the business of the assessee was not to invest in shares but to deal with the shares as a stock broker and trader. He observed that conversion of stock in trade into investment was done with the intention not to pay taxes as Section 10(38) was introduced by Finance Act, 2004 with effect from 1st April, 2005. Accordingly, he held that the entire amount was taxable as a “trading receipt” and not under the head “capital gains”.

4. The assessment order does not mention the date on which the



shares in question were purchased. We also note that the assessment order records that the assessee had converted and transferred the shares in question under the head “investment” on 1st April, 2004. This factual position was not disputed or questioned. The shares in question were sold during the period ending 31st March, 2006, nearly 2 years after the date of conversion of stock in trade into investment with a specific declaration. Mere fact that Section 10(38) was introduced in the statute by Finance Act 2004 with effect from 1st April, 2005, does not mean that the said conversion was improper or illegal. After the said Section was inserted, the assessee on noticing the tax benefit, was entitled to convert and change his holding from stock in trade into investment. Such conversion cannot be dealt with and rejected on the ground that Section 10(38) of the Act was introduced with effect from the said date. Conversion may be rejected for other reasons and grounds like the intention was not to convert and the assessee still continued to treat and regard the shares as stock in trade and not investment. But there is hardly any discussion in the assessment order in this regard. Justification and reasons have not been elucidated and brought on record to uphold the contention of the Revenue that the shares were continued to be held as stock in trade and not as an investment.

5. The Commissioner (Appeals) noticed that the shares in question



as held on 31st March, 2004 and their book value was as under:-

Scrip Name	Quantity	Book Value as on 31/03/2004
Global Tele	3,35,000	2,09,14,050/-
Himachal Futuristic	6,15,000	75,27,600/-
NIIT	20,000	33,97,200/-

6. The Commissioner (Appeals) has observed that in the balance sheet as on 31st March, 2005 the shares were shown under the head “inventories” and in the subsequent balance sheet as on 31st March, 2006 shares were again shown under the head “investment at book/fair value on 1st April, 2004”. Thus, the assessee converted the aforesaid stock in trade of Rs.3,18,38,850/- to the head “investment at book/fair value on 1st April, 2004” and the said disclosure was made in the balance sheets as on 31st March, 2005 and 31st March, 2006. In the first year, the Assessing Officer did not disturb the aforesaid conversion and accepted the same. The Commissioner (Appeals) noticed that for the Assessment Year 2005-06 assessment was concluded under Section 143(3) vide order dated 27th November, 2007 but the Assessing Officer did not object to the said conversion. These shares were subsequently sold as detailed in paragraph 2.9 of the order of the Commissioner (Appeals) in August, 2005, September, 2005 and



substantial portion was sold in March, 2006 and long-term capital gains was declared. He observed that statute did not reject or frown upon conversion of stock in trade into investment and the said conversion was permissible. Commissioner (Appeals) referred to the Circular No. 4/2007 dated 15th June, 2007 issued by the Central Board of Direct Taxes, which stipulates that two portfolios one for stock in trade and one in respect of investments could be maintained by the same assessee. He took into account the period of holding by the assessee and the fact that the conversion into investment was made on 1st April, 2004 and outlay was disclosed in the audited accounts for the Assessment Year 2005-06. The sales made, as noticed above, were after considerable delay of approximately two years thereafter.

7. In view of the aforesaid factual findings recorded by the Commissioner (Appeals) and the tribunal, we do not see any reason to interfere and issue notice on the main appeal. Accordingly, we are not inclined to issue notice on the application for the condonation of delay and the same and consequentially the appeal are dismissed.

SANJIV KHANNA, J.

SANJEEV SACHDEVA, J.

**OCTOBER 22, 2013
VKR/NA**