IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

INCOME TAX APPEAL NO. 13 OF 2014

The Commissioner of Income Tax-I, Pune. .. **Appellant**

Versus

Gurucharankaur Baldevsingh Wahi, Ahmednagar. .. **Respondent**

ALONG WITH

INCOME TAX APPEAL NO. 14 OF 2014

The Commissioner of Income Tax-I, Pune. .. **Appellant**

Versus

Gurucharankaur Baldevsingh Wahi, Ahmednagar. .. **Respondent**

ALONG WITH

INCOME TAX APPEAL NO. 15 OF 2014

The Commissioner of Income Tax-I, Pune. .. **Appellant**

Versus

Baldevsingh Santsingh Wahi (HUF), Ahmednagar. .. **Respondent**

ALONG WITH

INCOME TAX APPEAL NO. 16 OF 2014

The Commissioner of Income Tax-I, Pune. .. **Appellant**

Versus

Baldevsingh Santsingh Wahi (HUF), Ahmednagar. .. **Respondent**

In all appeals:
Mr D. V. Soman, Advocate for the appellant
Mr Mihir Naniwadekar, Advocate h/f Mr S. V. Advant, Advocate for respondent
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CORAM : A.V. NIRGUDE &
V.K. JADHAV, JJ.
DATED : FEBRUARY 5TH, 2015

PER COURT :-

1. These appeals challenged judgment and order passed by Income Tax Appellate Tribunal (ITAT) holding that the income shown by the respondents as ‘short term capital gain’ is not a ‘business profit’.

2. The facts leading to these appeals can, in short, be summarized as under :

The respondents are an individual and an HUF. They are husband and wife. Main line of business of these assesses is ‘Transport’. In addition to business of transport, for last 25 years, these assesses also earned profit from purchase and sale of shares. This activity is quite mixed and for number of years the assesses have made good profit in this activity also. They divided the profit made in this line in three parts. The profit made in non-delivery based transactions of share was classified as business income which was susceptible to higher rate of income tax. The second class was short term capital gain from delivery based transactions. Here also a higher rate of income tax was paid. The third class was long term capital gain (shares sold after holding them for more than 12 months). All along, the pattern of assessment was admittedly in the nature mentioned above. In 2005-06, the assesses showed short term capital gain from sale of shares (shares sold within 12 months from its purchase) to the tune of Rs. 28.00 Lakhs. The Assessing Officer accepted this as short term capital gain and not business profit but, during the year 2006-07, this income increased to the tune of Rs. 48.00 Lakhs. Even the number of transactions of this nature increased more than 100%. In the next year i.e. 2007-08, the short term capital gain decreased to Rs. 22.00 Lakhs. Even the number of transactions decreased to sizable extent. For the first time after 25 years, the Assessing Officer from these circumstances, drew a conclusion that the income which is shown as short term capital gain was not so but was business income. The reasons mentioned for coming to this conclusion are mentioned in assessment order.

"(1) The regularity, frequency, volume and continuity is quite high.

(2) The assessee purchased shares and it's dominant intention was to earn profit within minimum time.

(3) The intention of holding the shares for longer period to earn dividend is missing unless the assessee had taken recourse to the

benefit of section 94(7) of the I.T. Act.

(4) Whether two separate accounts and the entries are made in the books of accounts. It is found that no separate accounts distinguishing the investment and stock have been maintained.

(5) The assessee was riding very high in the boom period and wanted to make quick bucks."

3. With the result, the demand of Income Tax made to the assesses increased to manifold. They went in Appeal but, the Appellate Authority dismissed their appeal. It was the ITAT which came to their help, it set aside the conclusions drawn by the authorities below and upheld their contentions that the income which they showed as capital gain was indeed capital gain and not business income. In view of this, following substantial questions of law arise in these cases.

(i) Whether the appreciation of the evidence on record by Income Tax Appellate Tribunal (ITAT) is perverse?

(ii) Whether the judgments of the Assessing Officer and the Appellate Authority on question of fact requires interference?

4. The question that arises in these cases is a mixed question of law and fact, namely; whether the profit from sale of the shares in question was a revenue or a capital receipt. It is settled law that for the

purpose of ascertaining whether profit made upon a sale of an article is taxable profit, the question is required to be asked is; as to whether the article was acquired for the purpose of trade. If it is so, the profit arising from its sale must be brought into revenue account. We are referring to judgment of Supreme Court in the case of ***The Commissioner of Income-tax, Nagpur v. M/s. Sutlej Cotton Mills Supply Agency Ltd.***, reported in *A.I.R. 1975 SC 2106*. Incidentally this judgment is produced before us by Mr D. V. Soman, the learned Counsel for the appellant. We would quote following paragraphs of this judgment.

"8. …..The line between capital sales and sales producing income has been drawn by Lord Justice Clerk in Californian Copper Syndicate v. Harris, (1889) 5 Tax Cas 159 (Scot) in a passage which has become classical:

"It is quite a well settled principle in dealing with questions of assessment of income tax that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at the enhanced price is not profit...... assessable to income tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable where what is done is not merely a realisation or change of investment but an act done in what is truly the carrying on, or carrying out, of a business....... What is the line which separates the two classes of cases may be difficult to define, an each case must be considered according to its facts; the question to be determined being – Is the sum of gain that has been made a mere enhancement of value by realising a security or is it a gain made in an operation of business in carrying out a scheme for profit-making?."

9. In the absence of any evidence of trading activity in cases of purchase and resale of shares, it has been held that profit arising from the resale is an accretion to the caital. If a transaction is in the assessee's ordinary line of business there can be no difficulty in holding that it is in the nature of trade. But the difficulty arises where the transaction is outside the assessee's line of business and then, it must depend upon the facts and circumstances of each case whether the transaction is in the nature of a trade.

10. It is not necessary to constitute trade that there should be a a series of transactions, both of purchase and of sale. A single transaction of purchase, and sale outside the assessee's line of business may constitute an adventure in the nature of trade. Neither repetition nor continuity of similar transactions is necessary to constitute a transaction an adventure in the nature of trade. If there is repetition and continuity, the assessee would be carrying on a business and the question whether the activity is an adventure in the nature of trade can "hardly arise. A transaction may be regarded as isolated although a similar transaction may have taken place a fairly long time before (see I. R. C. v. Reinhold (1954) 34 Tax Cas 389.

11.The principles underlying the distinction between a capital sale and an adventure in the nature of trade were examined by this Court in Venkataswami Naidu & Co v. C. I. T. MANU/SC/0065/1958 : transaction cannot be determined solely on the application of any abstract rule, principle or test but must depend upon all the facts and circumstances of the case. Ultimately, it is a matter of first impression with Court whether a particular transaction is in the nature of trade or not. It has been said that a single plunge may be enough provided it is shown to the satisfaction of the Court that the plunge is made in the waters of the trade;

but mere purchase/sale of shares-if that is all that is involved in the plunge-may fall short of anything in the nature of trade. Whether it is in the nature of trade will depend on the facts and circumstances.

12. Where the purchase of any article or of any capital investment, for instance, shares, is made without the intention to resell at a profit, a resale under changed circumstances would only be a realisation of capital and would not stamp the transaction with a business character (see C. I. T. v. P. K. N. Co. Ltd. MANU/SC/0189/1965 : [1966]60ITR65(SC)).

13. Where a purchase is made with the intention of resale, it depends upon the conduct of the assessee and the circumstances of the case whether the venture is on capital account or in the nature of trade. A transaction is not necessarily in the nature of trade because the purchase was made with the intention of resale (see Jenkinson v. Freedland (1961) 39 Tax Cas 636; Radha Devi Jalan v. C.I.T. MANU/WB/0300/1951 : [1951[20ITR176(Cal) ; India Nut Co. Ltd. v. C.I.T. MANU/KE/0099/1959 : [1960]39ITR234(Ker) ; M/s. Sooniram Poddar v. C. I. .T.; Ajax Products Ltd. v. C.I.T. MANU/TN/0431/1960 : [1961]43ITR297(Mad) Gustad Irani v. C. I. T. MANU/MH/0015/1956 : [1957]31ITR92(Bom) ; and Mrs. Alexander v. C.I.T. MANU/TN/0106/1953 : [1952]22ITR79(Mad).

14. A capital investment and resale do not lose their capital nature merely because the resale was foreseen and contemplated when the investment was made and the possibility of enhanced values motivated the investment (see Leeming v. Jones (1930) 15 Tax Cas 333 and also the decisions of this Court in Saroj Kumar Mazumdar v. C. I. T. MANU/SC/0093/1959 : [1959]37ITR242(SC) and Janki Ram Bhadur Ram v. C. I. T. MANU/SC/0109/1965 :

[1965]57ITR21(SC).

15. In I. R. C. v. Fraser (1942) 24 Tax Cas 498 Lord Nor man said The individual who enters into a purchase of an article or commodity may have in view the resale of it at a profit and yet it may be that that is not the only purpose for which he purchased the article or the commodity, nor the only purpose to which he might turn it if favourable opportunity for sale does not occur. An amateur may purchase a picture with a view to its resale at a profit, and yet he may recognise at the time of afterwards that the pos session of the picture will give him aesthetic enjoyment if he is unable ultimately, or at his chosen time, to realise it at a profit....

16. An accretion to capital does not become income merely be cause the original capital was invested in. The hope and expectation that it would rise in value; if it does so rise, its realisation does not make it income. Lord Dunedin said in Leeming v. Jones (1930) 15 Tax Cas 333 :

The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or a concern in the nature of trade in respect of his investments, but per se it leads to no conclusion whatever.

This Court laid down in Venkataswami Naidu & Co. v. C. I. T. MANU/SC/0065/1958 : [1959]35ITR594(SC) that the dominant or even sole intention to resale is a relevant factor and raises a strong presumption, but by itself is not conclusive proof, of an adventure in the nature of trade.

17. The intention to resell would, in conjunction with the conduct of *the assessee and other circumstances, point to the business character of the transaction.*

18. In the light of the principles above referred to, it is necessary to examine whether the Tribunal had approached the question from the right perspective, viz., whether on the basis of its finding on questions of fact, the inference that the transaction was an adventure in the nature of trade was justified."

5. In view of this, we would also examine the facts of these cases to find out whether the transactions which are shown by the assesses as short term capital gain or were adventures in the nature of trade? We hold that they were short term capital gain. The first reason is that the assesses were earning short term capital gain by sale of shares for years together. They further kept admitting that the transactions in share, which were not delivery based, earned them profit and the same was an income from business. So, from transactions in share, the assesses were regularly getting income as business income on one side and as capital gain on other side. This pattern continued for more than 25 years and so the assessing officer ought to have accepted this pattern for the assessment years also. Having regard to the law on the subject there was possibility that even the short term capital gain shown in the account book of the assesses could have been categorized as business profit but

this would have amounted to discontinuing the earlier practice. This change was possible only on the basis of strong circumstances and evidence. There is no evidence on record besides the number of transactions and the profit earned. Indeed, the number of transactions increased in the assessment year but the assessing officer ought to have collected evidence to at least suggest that the pattern of business activity of the assesses changed, their main line of transport was no longer continued as main line etc. If this was not done, we are not inclined to give importance to the circumstances for which the assessing officer placed reliance. Similar view is taken by the members of Tribunal. We need not think it necessary to change such finding. We confirm the same. Appeals dismissed.

[V.K. JADHAV, J.] **[A.V. NIRGUDE, J.]**

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