

THE HON'BLE SRI JUSTICE G. CHANDRAIAH

AND

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

I.T.T.A. Nos. 26, 29 and 32 of 2015

COMMON ORDER:- (per Hon'ble Sri Justice G. Chandraiah)

These appeals, at the instance of Revenue, arise from the order dated 05.11.2014 in ITA Nos.1059, 1060, 1061 & 1062/Hyd/2013, of Income Tax Appellate Tribunal, Hyderabad Bench 'B', Hyderabad, for the Assessment Years 2005-06, 2007-08, 2009-10 & 2010-11.

2. The order impugned in these appeals, so also the substantial question of law, being identical, the appeals are taken together for disposal by this common order. The substantial question of law raised reads as under:

“In the facts and circumstances of the case, whether the Hon'ble Tribunal (ITAT) is correct in law in holding that the income earned by the Respondent-assessee out of sale and purchase of shares is income under the head 'Capital Gains' as against 'Business income' adopted by the Assessing Officer, without appreciating that the Respondent-assessee has been buying and selling shares and Units of Mutual Funds through out the year continuously and regularly through and organized, full time and day-to-day activity as also through day trading transactions?”

3. The Tribunal, vide its order dated 05.11.2014, after discussing various issues, held as under:

“12. So far as merits of the issue is concerned, a perusal of the assessment order would clearly reveal the fact that AO has treated the transaction in shares and units as a trading activity only on the consideration that they are very high in frequency and volume. Though, AO has observed that assessee has indulged in repetitive purchases and sales of the same

scrip, but, he has not given a single instance where the same share purchased by assessee was sold either on the same day or within a short duration. Only, because assessee had frequently purchased and sold shares of the same company does not mean that the same share was sold. Further, the statement made in director's report in no way helps in coming to a conclusion that the share transactions are in the nature of trading activity and not investment. It is further to be noted that AO has also observed that the very name of the assessee company indicates that the activity in share transaction is in the nature of business activity. In this context, he relied upon the order of the Tribunal in assessee's own case for AY 2006-07. Thus, from the aforesaid facts it becomes clear that while coming to the conclusion that transactions in shares and units are in the nature of trading activity, AO more or less has adopted the observation/finding of CIT and ITAT for AY 2006-07. However, the aforesaid finding of both CIT and ITAT were found to be devoid of merit by the Hon'ble AP High Court while deciding assessee's appeal for AY 2006-07. The Hon'ble AP High Court after exhaustively dealing with the nature of transactions and examining in detail found that the transactions carried out by assessee in shares and units of mutual funds are in the nature of investments only for the following reasons:

- (a) investments are made with own funds and not with borrowed funds
- (b) The closing stock was valued in the books of accounts consistently at cost and not at cost or market price whichever is lower.
- (c) It had earned substantial dividend income.
- (d) More than 99% of the total gains are long term capital gains and less than 1% is short term capital gain, 40% of the investments are in mutual fund.
- (e) The assessee never dealt in futures, derivatives and options.
- (f) All the transactions of purchases and sales were delivery base excepting one solitary instance of Reliance Industries Ltd.
- (g) The assessee was registered as NBFC with RBI.
- (h) The assessee never claimed set off of the loss arising from sale of investments against other income.
- (i) Merely because of large frequency of volume

of transaction, a conclusion that an assessee is a trader cannot be drawn without considering the period of holding of those shares by the assessee.

(j) A trader in shares normally holds them for a short time only and is unlikely to invest in unquoted shares or in mutual funds he is likely to borrow funds for his trading activity.

(k) The fact that the assessee is monitoring the stock market and buying at dips and selling at highs with an intention to make profit from these transactions is not conclusive of the fact that the assessee is a trader because even an investor would not buy or sell blindly and take the risk of suffering losses.

(l) The fact that the assessee has a administrative set up and incurs considerable administrative costs is not a factor to hold that the assessee is a trader.

(m) The fact that the assessee is making repetitive purchases and sales of same shares is a factor in favour of holding that the assessee is an investor in view of the amendments to section 10(38) and section 115JB of the Act.

(n) The revenue had accepted that the assessee was an investor whose income is chargeable under the head capital gains for a number of years.

Accordingly, the Hon'ble Jurisdictional High Court set aside the order of ITAT as well as that of CIT. It is very much evident from the reasons recorded as well as assessment order that only on the basis of the order passed in case of assessee for AY 2006-07, AO has concluded that income derived from transactions in shares and units should be assessed as income from business activity. As the Hon'ble High Court has upheld the assessee's claim for AY 2006-07 and facts obtaining in the impugned assessment year are different from the facts considered by the Hon'ble AP High Court in AY 2006-07 or for that matter, the parameters laid down by the Hon'ble High Court in 2006-07 do not apply to the fact of the present case, we do not find any reason to interfere with the order of learned CIT(A). Accordingly, we dismiss the grounds raised by department."

4. A reading of the extract would leave no manner of doubt that the Tribunal had followed well settled principles which were set out in the judgment of this Court in the assessee's own case in **Spectra**

Shares and Scripts Pvt. Ltd. V. Commissioner of Income-Tax^[1], for the Assessment Year 2006-07, and hence the question raised is squarely covered. It is also found that except for the year 2006-07, for earlier years, the assessee was assessed under the head “Capital Gains” and not under “Business Income”, notwithstanding the frequency of transactions involved, inasmuch as, at all times, the assessee took delivery of the shares and, at appropriate time, had sold them.

5. Inasmuch as the substantial question of law raised in these appeals is squarely covered by the judgment of this Court in **Spectra Shares (1 supra)**, we see no reason to take a different opinion.

6. The appeals are, accordingly, dismissed. No costs. Miscellaneous petitions, if any pending in these appeals, shall stand closed.

G. CHANDRAIAH, J

CHALLA KODANDA RAM, J

15th June, 2015

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[\[1\]](#) [2013] 354 ITR 35 (AP)