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

Decided on: 02nd February, 2015

+ ITA 520/2014

SANJEEV MITTAL

..... Appellant

Through Dr. Rakesh Gupta and Mr. Mukul Mathur, Advs.

versus

COMMISSIONER OF INCOME TAX

..... Respondent

Through Mr. Rohit Madan and Mr. Ruchir Bhatia, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The assessee is aggrieved by the order of the Income Tax Appellate Tribunal (hereinafter referred to as "the ITAT") to the extent that it remitted the case for reconsideration by the Assessing Officer (AO) on the assumption that additional evidence had been filed, or was sought to be led by the assessee. The question sought to be urged is whether in the circumstances of the case the nature of the remand ought to have been limited, given that the CIT(Appeals) considered all materials on record and held that the sum of ₹1,97,17,460/-, reported during assessment year 2007-08, constituted capital gains.

2. The assessee concededly is a medical practitioner. He reported ₹1,39,097/-, as his professional income in his returns. The AO noticed that

professional receipts of the appellant amounted to ₹7,49,500/-. This was a mere 1/37th of the gains from transactions in shares. Before the AO, the appellant contended that the said amount of ₹1,97,17,460/- constituted capital gain and could not be treated as professional or business income. The assessee's primary submission was that in the concerned assessment year, 57 transactions recording sale of shares of various companies held by him, for periods ranging from 366 days to over 1150 days were involved. Consequently, given the settled position in law on the question of whether the income was a capital account or a business income, it had to be treated as capital gain. The AO however rejected this contention and treated the entire amount as business income, thus applying a higher rate of tax. The assessee's appeal to the CIT(Appeals) succeeded. The CIT(Appeals) pertinently held as follows :

“That the appellant made investments in shares in last several years and he was lucky enough amongst millions that he sold his investments when the senssex was at fire. During the year under assessment the appellant earned LTCG of Rs.1.98 crores i.e. about 71%, of the total gain and STCG of Rs. 0.80 crore i.e. about 29% of the total gain.

That while earning LTCG more than 74% of the shares were held for more than 18 months and in 11% cases shares were held for more than 36 months. Moreover 69% of the LTCG was earned on account of bonus and split shares being received against original investments.

Sir, it could have been well appreciated by the learned AO from the records made available before him that the appellant had consistently been declaring income in past and future years under the head LTCG/ STCG and also consistently reflecting the impugned investments in the financial statements under the head 'Investments' and valuing the same at 'cost price' unlike on 'cost price or market price which ever is less' as is done by a trader as, also mandated by

the Accounting Standard released by the accounting apex body ICAI.

Ex.-2-Some examples inter-alia of major scripts being bought and sold where the appellant earned LTCG of Rs.1,97,93,968/- during the year and where the holding period was up to 1,151 days:-

<i>Sl</i>	<i>Scripts</i>	<i>Dt Purchase</i>	<i>Cost</i>	<i>Nos</i>	<i>Dt Sale</i>	<i>Sale Price</i>	<i>LTCG</i>	<i>Days</i>
1	Thermax Ltd.	10/13/2003	33083	500	12/7/2006	190055	156972	1151
2	Thermax Ltd.	11/13/2003	112151	1695	12/19/2006	629698	517547	1132
3	BEL	3/10/2003	385000	1000	4/12/2006	1347010	962010	1129
4	Thermax Ltd.	11/17/2003	155496	2305	12/19/2006	856316	700820	1128
5	Havell's India Ltd.	10/22/2003	99923	1125	11/7/2006	343411	243488	1112
6	Havell's India Ltd.	10/22/2003	15544	175	11/7/2006	53288	37744	1112
7	Indian Rayon	7/11/2003	141430	1000	6/13/2006	552201	410771	1068
8	Crompton Greaves	11/25/2003	14121	500	10/3/2006	121118	106997	1043
9	Crompton Greaves	11/25/2003	70604	2500	9/18/2006	560140	489536	1028
10	KPIT Cummins	12/2/2003	2599989	2000	8/4/2006	770800	510811	976
11	Crompton Greaves	11/25/2003	42363	300	6/12/2006	241799	199436	930
12	Hindustan Cons	9/17/2004	191292	10000	3/5/2007	950000	758708	899
13	Crompton Greaves	10/17/2003	67831	500	4/1/2006	525000	457169	897
14	Jindal Steel	7/29/2004	272000	50	1/11/2007	1059612	787612	896
15	Crompton Greaves	11/25/2003	70604	500	4/1/2006	525000	454396	858
16	Havell's India Ltd.	8/20/2004	142420	1000	11/7/2006	307891	165471	809
17	IVRCL Infra	10/20/2004	94279	1875	11/7/2006	641244	546965	748
18	Jindal Steel	7/28/2004	281365	500	8/8/2006	733068	451703	746
19	Kalataru Power	3/16/2005	96847	200	2/28/2007	219071	122224	714
20	Kalataru Power	3/23/2005	231169	500	3/5/2007	497625	266456	712
21	IVRCL Infra	5/3/2005	87136	1000	3/5/2007	276043	188907	671

22	<i>Simplex Const.</i>	5/2/2005	50481	490	2/27/2007	168007	117526	666
23	<i>IVRCL Infra</i>	5/3/2005	130704	1500	2/26/2007	511282	380578	664
24	<i>EID Parry India</i>	10/12/2004	131731	2000	8/4/2006	389100	256369	661
25	<i>IVRCL Infra</i>	5/3/2005	130704	1500	2/15/2007	570995	440291	653
26	<i>EID Parry India</i>	11/4/2004	72961	1000	8/4/2006	194550	121589	638
27	<i>Simplex Const.</i>	6/23/2005	101869	770	3/5/2007	225211	123342	620
28	<i>Havell's India Ltd.</i>	8/8/2005	0	2800	3/29/2007	1256569	1256569	598
29	<i>IVRCL Infra</i>	5/3/2005	87136	1000	12/18/2006	398684	311548	594
30	<i>KEC International</i>	9/3/2004	83510	1000	4/19/2006	405490	321980	593
31	<i>KEC</i>	9/3/2004	83509	1000	4/18/2006	407700	324191	592
32	<i>Kalataru Power</i>	3/16/2005	145270	300	10/21/2006	246002	100732	584
33	<i>Kalataru Power</i>	3/4/2005	117311	300	9/25/2006	231326	114015	570
34	<i>IVRCL Infra</i>	10/20/2004	100564	2000	4/28/2006	566722	4666158	555
35	<i>IVRCL Infra</i>	10/20/2004	25141	500	4/25/2006	152681	127540	552
36	<i>IVRCL Infra</i>	10/8/2004	111301	2500	4/12/2006	799690	688389	551
37	<i>EID Parry India</i>	11/5/2004	71314	1000	4/25/2006	305726	234412	536
38	<i>Havell's India Ltd.</i>	8/8/2005	0	1200	1/15/2007	573718	573718	525
39	<i>Hindustan Cons.</i>	3/28/2005	87767	2000	8/24/2006	214400	126633	514
40	<i>Simplex Const.</i>	4/15/2005	97192	200	9/9/2006	364880	267688	512
41	<i>Ashapura Mine</i>	3/23/2005	162453	2000	8/4/2006	386800	224347	499
42	<i>Simplex Const.</i>	5/2/2005	51511	100	9/11/2006	186137	134626	497
43	<i>Ashapura Mine</i>	3/16/2005	7995	1000	6/28/2006	182670	102675	469
44	<i>Ashapura Mine</i>	3/16/2005	79995	1000	6/27/2006	181839	101844	468
45	<i>Ashapura Mine</i>	7/6/2005	92028	1005	10/17/2006	205216	113138	468
46	<i>Ashapura Mine</i>	7/7/2005	89887	990	10/17/2006	202153	112266	467
47	<i>Hindustan Cons.</i>	3/28/2005	131652	3000	6/15/2006	504603	372951	444
48	<i>Ansal Properties</i>	12/7/2005	263482	1500	2/23/2007	853421	589939	443
49	<i>Simplex Const.</i>	4/12/2005	51498	102	6/9/2006	158085	106587	423
50	<i>Simplex Const.</i>	4/7/2005	48201	92	5/19/2006	201305	153104	407
51	<i>Ashapura Mine</i>	3/4/2005	70132	765	4/5/2006	189865	119733	397
52	<i>Titan Industries</i>	9/23/2005	239538	500	10/23/2006	395379	155841	395
53	<i>Ansal Properties</i>	12/6/2005	41303	250	12/7/2006	265717	224414	366

						<i>Total</i>	<i>17,401,526</i>	
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3. Likewise the CIT(Appeals) noted that even though certain loans had been availed from banks and private sources – the materials on record did not suggest any link between the acquisition of shares, which were ultimately sold, and the availing of such credit. The CIT(Appeals) pertinently noticed that *“It may be worth noting, however, that all the gains resulted during the year in question were from the holdings of the prior period when the credit line from the bankers were started availing by the appellant. Moreover, the interest paid on loans was neither claimed as an expense against LTCG/STCG nor against professional income.”*

4. The CIT(Appeals) also concluded that apart from the shares, he was holding properties of substantial value, had given loans, to family members to the extent of ₹78.99 lakhs as on 31.03.2007, as against secured loans of ₹2 crores, and secured loans by banks upto ₹39.75 lakhs as on that date. Consequently, the CIT(Appeals) concluded that loans against securities were used for multifarious purposes. In these circumstances, applying the ratio in *Ramnarain Sons (P.)Ltd. v. CIT* [1961] 41 ITR 534, the dominant intention of availing the loans was not for the purpose of share purchase.

5. Thus applying the well-settled principle that the intention of the assessee is to be discovered from various angles such as the expenditure, length of holding, volume, and frequency of share sale and purchase transaction, whether the shares were acquired through borrowed funds or funds of the assessee, and whether separate accounts were maintained for

the purpose and the duration of holding, the CIT (Appeals) concluded that the assessee's contentions were acceptable.

6. The CIT (Appeals) however said as follows :

“2.10 The appellant was asked to clarify whether any additional evidence has been filed during appellate proceedings. Vide submissions dated 14.2.11, the appellant has clarified that no additional evidence has been filed during appellate proceedings.

DETERMINATION

2.11 The submissions of the appellant and the facts have been carefully considered. Various judicial decisions on this subject including those cited by the appellant have also been perused. These decisions lay down principles on the basis of which, it has to be decided whether income from shares is to taxed under the head capital gains or under the business head. No single criterion is decisive but a holistic consideration of all the factors is required. In the light of principles laid down in these decisions, it is clear that in this case, the AO's decision to tax income from shares under the business head and not under the head capital gains, is not legally tenable.”

7. Having regard to the elaborate discussion, the CIT (Appeals) consequently concluded that the department's contention that the amounts ought to be treated as business income was meritless in the following terms :

“2.1 Ground no. 1 challenges the addition of Rs. 2,77,96,322/- on account of considering STCG and LTCG of Rs. 80,02,356/- and Rs. 1,97,93,968/- as business income. In the astt. order, the A.O. has stated that the appellant is a doctor by profession and has been engaged in the business of buying and selling of shares. The professional receipts of the appellant amount to merely Rs.7,49,500/-. On inquiry about the reasons of low professional income, the appellant explained that the nature of his specialization does not call for much of OPD practice. The A.O. has observed

that the appellant does not have much of a practice and consequently he is engaged in share trading on a regular basis. The A.O. has observed that during the year, the assessee had carried on in a systematic and organized manner, numerous transactions of buying and sale of shares, which constitutes his business activities. The A.O. has referred to the chart containing the capital gain statement submitted by the assessee during assessment proceedings and has observed that this clearly indicates that the assessee carried out a large number of transactions with huge volumes and some of the transactions are completed in a very short period. The A.O. observed that this clearly indicates that the motive of the assessee while buying and selling these shares was to earn profit. The A.O. held that these frequent transactions carried out by the assessee are in the nature of business activities and not capital investment as claimed by him. Accordingly, the profits arising from purchase and sale of shares were treated as profit from business and not as capital gains.”

8. The ITAT felt that there was no clarity as to whether additional evidence had been produced during the course of CIT(Appeals)’s proceeding. The ITAT thereafter recorded its findings upsetting the Appellate Commissioner’s order in the following terms :

8.1 As regards the merits of the case, we find that before the Ld. CIT(A), assessee has made elaborate submissions running from pages 4 of the Ld. CIT(A)'s order to pages 36 out of the total 44 pages CIT(A)'s order. In these submissions, there are various charts also submitted. In this regard, we note that from the reading of the AO's order and the appellate order, it is not clear whether the detailed submissions and charts produced before the Ld. CIT(A) were also submitted before the AO. In this regard, Ld. CIT (A) himself has doubted in Para 2.10 of his order. Ld. CIT(A) has noted that assessee was asked to clarify whether any additional evidence has been filed during appellate proceedings. Ld. CIT(A) accepted the assessee's submissions that no additional evidence were filed. Thus Ld. CIT(A) without verifying from the AO, has accepted that additional evidence were furnished during the

appellate proceedings. In our considered opinion on the facts and circumstances of the case, AO should have been given an opportunity to go through the submissions before the Ld. CIT(A) and given a report.

8.2 As regards, the merits of the case, we note that Ld. CIT(A) has produced the assessee's submission in his whole order and then in few pages he has noted down briefly the assessee's submission in his own order. Thereafter, Ld. CIT(A) has allowed assessee's appeal. Ld. CIT(A) has not given any finding himself on the submissions of the assessee. In these circumstances, the Ld. CIT(A) order cannot be said to be a speaking order showing proper application. In our considered opinion, on the facts and circumstances of the case, interest of justice will be served if the matter is remitted to the file of the AO. The AO is directed to consider the issue afresh. Needless to add that the assessee should be granted adequate opportunity of being heard.

9. The appellant's counsel urged that all material was produced in the course of the assessment proceedings. He highlighted the fact that of all the share transactions which yielded substantial income, 69% was on account of sale of bonus shares and split shares. Counsel highlighted the CIT (Appeals)'s orders to show that the shares in question were held for a considerable long period ranging from about a year to 1150 days. In fact, it was submitted that the CIT (Appeals) took note of the fact that 11% of the shares were held for more than 36 months and 74% of the shares were held for more than 18 months. Furthermore, given that there was no linkage between the borrowings and the amounts used for acquisition of shares, the confusion in the ITAT's findings stemmed from its mis-appreciation of the facts.

10. Learned counsel for the revenue urged that the AO had also taken note of the previous year's assessments, which had, in turn, noticed that

amounts towards capital gains had been reported. This, according to counsel, supported the AO's findings for this year that the appellant's primary activity was not medical practice but share trading. It was also urged that given the dis-proportionate ratio between the medical earnings and the share transactions earnings, the findings of the AO should not have been interfered with, and in these circumstance, the remand directed by the ITAT in the widest terms has to be upheld.

11. This Court has considered the submissions. The record itself would show that the CIT(Appeals) painstakingly looked into the nature of transactions and apparently analysed each one of them to conclude that the income derived from sale of shares was not business income but capital gains. In arriving at this decision, the CIT(Appeals) was guided by several binding decisions, such as *CIT V. Associated Industrial Development Company (P) Ltd.* (1971) 82 ITR 586 (SC), *Raja Bahadur Kamakhya Narayan Singh V. CIT* (1970) 77 ITR 253 (SC) and *CIT V. Holck Larsen* (1987) 160 ITR 67 (SC) etc. In fact the order of the CIT (Appeals) with respect to analysis of the facts covers a considerable part of the order.

12. Likewise the analysis of case law and the inference is drawn on the basis of its application run into over 30 pages. The contentions noted by the CIT (Appeals) are at para 2.11 and its findings ultimately favouring the assessee are at para 2.14. The ITAT apparently was mistaken in its assumption that some additional evidence was led before the CIT (Appeals). In fact, the order of the CIT (Appeals), in para 2.10 clearly records that the appellant had clarified that no additional evidence was filed during the appellate proceedings. Furthermore, a comparison of the details of the share

transactions in question from the AO's order and the CIT (Appeals) order would show that there is complete identity as to the details of the transactions i.e. the name of the companies, the duration of holding, date of purchase, date of sale etc. In fact, CIT (Appeals)'s order is a more elaborate analysis of some basic material. Furthermore, it was not pointed out during the course of the hearing as to what was the additional material or evidence reiterated before the CIT (Appeals) by the assessee, which necessitated the remand. In these circumstances, the Court is of the opinion that present appeal has to succeed. However, we notice that the CIT (Appeals) had recorded that 29% of the transactions reported by the assessee could be treated as short term capital gain. In these circumstances, the remand directed by the ITAT is limited to enquiry on this aspect. The rights and contentions of the parties on this question are reserved. The AO shall proceed to deal with and decide as to which shares are to be treated as short term capital gain, for the purposes of directions contained in this judgment in accordance with law. Consequently, the appeal is allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

R.K.GAUBA
(JUDGE)

FEBRUARY 02, 2015
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