

\$~11

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **DECIDED ON: 03.03.2015**

+ ITA 517/2012
C.M. No.15387/2012

CIT Appellant
Through: Mr. Rohit Madan, Sr. Standing Counsel.

versus

AMIT JAIN Respondent
Through: Mr. Ajay Vohra, Sr. Advocate with
Ms. Kavita Jha and Mr. Vaibhav Kulkarni,
Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K. GAUBA

S.RAVINDRA BHAT, J. (OPEN COURT)

1. By an order dated 25.09.2013, the following question of law was framed: -

Whether the transaction in question was rightly held by the Tribunal in the nature of investment and not in the nature of trade?

2. The facts of the case are that for assessment year (AY) 2006-07, the assessee had reported an amount of ₹2.61 crores as short term capital gain as against a total assessed income of ₹2.63 crores. Besides short term capital gain, the assessee had also reported a sum of ₹47.14 lakhs as long term capital gains which was accepted. In the

scrutiny assessment, the AO formed an opinion that the assessee's claim of ₹2.61 crores being short term capital gains was not admissible having regard to the nature of the transaction. The assessee had during the relevant assessment year traded in 329 scripts (as against the 1833 scripts held by him). Having regard to the frequency and volume of the transaction and the further circumstance that the assessee did not report any other form of income in his returns, the AO felt that short term capital gain as claimed was inadmissible and brought the sum of Rs.2.61 crores to tax under the head "business income".

3. The assessee's appeal was rejected by the CIT (Appeals) by a reasoned order. On further appeal to the Income Tax Appellate Tribunal (ITAT), the Tribunal accepted the assessee's contentions.

4. The basis of the ITAT's findings may be found from the following extracts: -

"10. Let us consider the facts discussed by the learned revenue authorities below in the impugned orders. According to the assessee, the primary intention for making investment in shares is to earn dividend income, to keep the capital funds available with the assessee intact, to ensure that the capital invested in the shares grow over a period of time on account of the capital appreciation and to be part of growth of the investee company. He demonstrated on the record that he has been making investment from the last two decades as an investor. The past history available on page Nos.223, 234, 379 and 420 of the paper book depicts the following position in respect to his investment:

<i>Assessment year</i>	<i>In the return of income</i>	<i>Assessment</i>
<i>2003-04</i>	<i>LTCG & STCG</i>	<i>Intimation u/s 143 (1)</i>

		<i>of the Income-tax Act, 1961 ('the Act')</i>
<i>2004-05</i>	<i>LTCG & STCG</i>	<i>Intimation u/s 143 (1) of the Act.</i>
<i>2005-06</i>	<i>LTCG & STCG</i>	<i>Assessment u/s 143 (3) of the Act, accepting the appellant as investor if and the gains as capital gains.</i>
<i>2006-07</i>	<i>LTCG & STCG</i>	<i>LTCG= Accepted by the Assessing Officer STCG=In dispute.</i>
<i>2007-08</i>	<i>LTCG & STCG</i>	<i>Intimation u/s 143 of the Act.</i>
<i>2008-09</i>	<i>LTCG & STCG</i>	<i>Assessment u/s 143 (3) of the Act, accepting the long term capital gains declared in the return.</i>

11. It also emerges out from the record that assessee being investor has not been maintaining any office established or keeping any staff. He is also not registered with any authority or body such as stock exchange and SEBI etc. He is not maintaining regular books of account but submitted the details in respect of the investment before the Assessing Officer. He has not classified the shares held by him as stock-in-trade. The entire portfolio is valued at cost and not at cost or market price whichever is lower because that can only be applied if the shares were held as stock-in-trade. He is not having any current account and is only maintain S/B Account. The entire investment has been made out of his own fund and not out of borrowed funds. The entire investment has been held by the assessee in his own name and not in the name of any business

entity i.e. firm etc. According to the assessee, he has received substantial dividend income of Rs.10.10 lacs. The learned counsel for the assessee at the time of hearing pointed out that dividend yield on investment was around 2.10% which is much higher than normal expected yield of 1.5% on the shares invested. For buttressing this aspect, he drew our attention towards indices of the sensx. He placed on record these details.”

5. It is contended on behalf of the Revenue that regardless of how the assessee considered the nature of the transactions, a proper application of the legal tests, would result in the treatment of sum of ₹2.61 crores as business income. Learned counsel relied upon the judgment of Gujarat High Court in *Commissioner of Income Tax v. Rewashanker A. Kothari*, (2006) 283 ITR 338 which had formulated the following tests to decide whether the nature and character of sums reported as income are truly business income or on account of capital gains:

“(a) The first test is whether the initial acquisition of the subject matter of transaction was with the intention of dealing in the item, or with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline.

(b) The second test that is often applied is as to why and how and for what purpose the sale was effected subsequently.

(c) The third test, which is frequently applied, is as to how the assessee dealt with the subject matter of transaction during the time the asset was with the assessee. Has it been treated as stock-in-trade, or has it been shown in the books of account and balance sheet as an investment. This inquiry, though

relevant, is not conclusive.

(d) The fourth test is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of transaction and would be a relevant circumstance to be considered in absence of any satisfactory explanation.

(e) The fifth test, normally applied in cases of partnership firms and companies, is whether the deed of partnership or the memorandum of association, as the case may be, authorises such an activity.

(f) The last but not the least, rather the most important test, is as to the volume, frequently, continuity and regularity of transactions of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of the transaction, bearing reasonable proportion to the strength of holding, then an inference can readily be drawn that the activity is in the nature of business.”

The above ruling was approved and applied in the judgment of this Court in *Commissioner of Income Tax v. Central News Agency Pvt. Ltd.*, (ITA 1032/2011, decided on 9.9.2014).

6. Learned senior counsel for the assessee contended that the record clearly indicates that as against 1833 shares held by the assessee, only 329 were traded at the relevant time. Of the Rs.2.61 crores claimed as short term capital gain, Rs.1.72 crores were derived from the sale of 35 scripts; the counsel emphasises that this denoted 65% of the short term capital gain reported during the assessment year. It was further submitted that for all relevant past years up to

2005-06 and even subsequently - including periods when scrutiny assessments were made, the Revenue uniformly accepted the assessee's arguments that such income was on account of short term capital gain and had no occasion to doubt it, or treat the amounts as derived from business income. Emphasising the need for consistency, learned counsel for the assessee submitted that for the current assessment year i.e. AY 2006-07, for the Revenue to successfully state that the character of income is otherwise, some unique facts or evidence had to be placed on record - both of which were absent.

7. Learned counsel lastly submitted that the conclusions of the AO and the CIT (A) were largely based on the fact that the volume and transaction was considerable and yielded substantial income.

8. The factors which Courts and Tribunals have to take into consideration whilst deciding whether income gained during a particular period is business income through purchase and sale of shares or other tradable capital assets, or capital gains on account of sale of such assets, has been spelt out and reiterated in a number of decisions. These include *Raja Bahadur Visheshwar Singh v. CIT*, (1961) 41 ITR 685 (SC); *Commissioner of Income Tax, U.P v. Madan Gopal Radhey Lal*, [1969] 73 ITR 652 (SC); *Commissioner of Income Tax v Associated Industrial Development Company* 82 ITR 586 (SC); *P.M. Mohammed Meerakhan v. Commissioner of Income- tax, Kerala*, 73 ITR 735 (S.C.) and *Commissioner of Income Tax v NSS Investments Ltd* 2007 (277) ITR 149 (Mad). It was in the light of these decisions that the CBDT Circular No. 4/2007, was issued, indicating the principles applicable in this regard. These criteria are:

(1) Intention of the assessee at the time of purchase of the shares. This can be found out from the treatment given to the purchase in the assessee's books of account.

(2) Did the assessee borrow money to purchase the shares, and paid interest for it. Money is generally borrowed to purchase goods for the purposes of trade and not for investing in an asset for retaining.

(3) Volume and frequency of the purchases and sale/disposals. If purchase and sales are frequent, or there are substantial transactions in an item, that can indicate trade. Habitual dealing in a particular item is indicative of intention of trade. Likewise, ratio between the purchases and sales and the holdings may show whether the assessee is trading or investing (high transactions and low holdings indicate trade whereas low transactions and high holdings indicate investment). Another related factor is the duration for which the shares are held.

(4) Was the purchase and sale made for realizing profit, or for retention and appreciation in its value. The former indicates the purchases being part of trade; and the latter is indicative of the purchases being an investment. Furthermore, it would be relevant to ask whether the intention behind the purchase was to enjoy dividend, or merely to earn profit on sale of shares. Importantly, a commercial motive is an essential ingredient of trade in this context.

(5) Whether the items in question were valued at cost. If so, it would indicate that they were investments. Where they were

valued at cost or market value or net realizable value, whichever is less, it will indicate that items were treated as stock-in-trade.

(6) Finally, it would be relevant to consider how the assessee is authorized in its Memorandum / Articles.

In the present case, there is no dispute that the opening investment cost for the relevant year AY 2006-07 was Rs.2.60 crores; the corresponding closing value was Rs.4.70 crores. Furthermore, the Court notices that the assessee derived, in addition to the short term capital gains, dividend income to the tune of nearly Rs.10 lakhs. The authorities have all emphasised that even while seeing the cumulative effect of the tests, in the given facts of a case, one test might be determinative or conclusive. At the same time, no single test having regard to the facts of a case and a cumulative effect thereof, need be determinative or conclusive. In the present instance what is apparent is that the assessee, an individual, did not borrow any funds; the share scripts traded were only from amongst what were held by him. Significantly, dividend income amounting to about 4% of the value of the investment was earned by the assessee. What appears to have weighed almost conclusively with the tax authorities in the first and second instance is the value and frequency of the transactions. As underlined by us, that factor alone cannot be conclusive and would have to be weighed along with the totality of facts. An important detail which cannot be overlooked by the Court is that in all past periods and even subsequent periods, similar income reported by the assessee was accepted by the Revenue as short term capital gain. In

fact for AY 2005-06, the scrutiny assessment under Section 143 (3) accepted the sum of Rs.1.02 crores as short term capital gain. In the circumstances, it was all the more necessary for the Revenue to point to some unique feature or distinctive material to differentiate the assessee's activities for the subject assessment year, since they fundamentally remained the same and unchanged.

9. On an appropriate application of the authorities, this Court is of the opinion that the ITAT's findings and view cannot be faulted in the circumstances of the case. The question of law is, therefore, answered in favour of the assessee and against the Revenue. The appeal is accordingly rejected.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

MARCH 03, 2015
/vikas/