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

\+ ITA 739/2016 & CM No. 40123/2016

PRINCIPAL COMMISSIONER OF INCOME-TAX – 8 ..... Appellant

Through: Mr. Dileep Shivpuri, Mr. Sanjay Kumar and Mr. Vikrant A. Maheshwari, Advs.

versus

M/S SPACE POWER CONTROLS PVT. LTD. ..... Respondent

Through

\+ ITA 740/2016

PRINCIPAL COMMISSIONER OF INCOME-TAX – 8 ..... Appellant

Through: Mr. Dileep Shivpuri, Mr. Sanjay Kumar and Mr. Vikrant A. Maheshwari, Advs.

versus

M/S SPACE POWER CONTROLS PVT. LTD. ..... Respondent

Through

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

% **21.11.2016**

1. The Revenue is aggrieved by the direction of the Income Tax Appellate Tribunal (in short 'ITAT') to delete the penalty imposed upon the assessee for assessment years 2006-07 and 2007-08. The assessee had claimed *inter alia* higher capital gains in respect of several transactions in shares. The Assessing Officer ('AO') rejected

these claims holding that the transactions were not in the normal course of business. In doing so, the AO considered the volume of investments, their period of holding, whether the assessee had deployed its own funds and whether separate books of accounts were kept and the manner in which the shares were held – either as stock-in-trade or as investment assets. The Commissioner of Income Tax (Appeals) [CIT(A)] affirmed the addition but directed that the penalty could not be imposed. Aggrieved by the CIT(A)'s order the Revenue appealed unsuccessfully to the ITAT.

2. The ITAT highlighted that in accord with explanation (b) to Section 271(1) the argument of the assessee with respect to its claim as a short-term capital gain was not benefited and, therefore, in the circumstances of the case penalty was not justified. We notice that ITAT in its order in para 16 has presented the facts in a tabular form. Its reasons are contained in following terms:

> *"..... 17. We find from the above that the assessee has transacted in single scrip in multiple times during the year but sometimes even more than once in a day itself. For example, the scrip 'Era Construction' has been transacted on 19/02/2007, 20/02/2007, 21/02/2007, 06/09/2006, 11/09/2006, 09/10/2006. Similarly, the scrip 'Karuti Company' has also been transacted many times during the year. The quantity of scrip transacted in each transaction is in thousands. The sale volume transacted under the head short-term gain is more than Rs. 12 cores. The assessee has sold total shares quantity of Rs. 3.51 Lacs. All these figures establish existence of the factor of volume, frequency and consistency of transactions.*

18. We find that whenever any shares is purchased with the intention of investment, it cannot be sold within a short period as the market fluctuate because of many national and international events. In the present case, the frequent purchase and sales of the shares indicates that the intention of the assessee was to earn profit over a short period on the money means for manufacturing of power equipments, parked temporarily in the share market.

19. In the case of M/s D & M Components Ltd. (supra), the Hon'ble Court has referred to the Supreme Court decision in the case of P. Mohammed Meerakhan Vs. Commissioner of Income Tax, Kerala, 73 ITR 735 (SC), wherein it is held that there is no single test or formula which could be applied in determining whether the transaction was an adventure in the nature of trade or not and the question depends in each case on total impression and effect of all relevant factors and circumstances proved therein which determine the character of the transaction.

20. In the facts of the case, we find that mere not using interest bearing borrowed funds is not sufficient to conclude that transaction of share sales are not business income. Having regard to the volume and frequency of the transactions, no separate books of accounts or demat accounts and other facts and circumstances, we are of the opinion that overall effect of all the factors revealed that the activity of sale and purchase of shares claimed under the head 'short-term capital gain' cannot be sustained and it is held as the activity in the nature of business and assessable under the head 'profit and gains of the business'. Accordingly, we uphold the finding of the learned Commissioner of Income-Tax (Appeals) on the issue in dispute and the ground of the appeal is dismissed....."

3. Having regard to the concurrent nature of finding and the fact

that the ITAT carried out an elaborate exercise of fact discussion, we are of the opinion that no interference is called for with the impugned order. We may also notice that the ITAT had relied upon the Ruling of the Supreme Court in ***Commissioner of Income-tax v. Reliance Petroproducts (P) Ltd***, (20 10) 322 ITR 158 (SC). No substantial question of law arises. The appeal is, accordingly, dismissed.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

NOVEMBER 21, 2016/kk