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IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 829/2015

PR. COMMISSIONER OF INCOME TAX,
CENTRAL -3

..... Appellant

Through: Mr. Ashok K. Manchanda, Senior
Standing counsel with Ms. Vibhooti Malhotra,
Advocate.

versus

DREAMLAND BUILD TECH P. LTD.

..... Respondent

Through: Dr. Rakesh Gupta and Mr. Somi
Agarwal and Ms. Monika Ghai, Advocates.

WITH

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ITA 908/2015

PR. COMMISSIONER OF INCOME TAX,
CENTRAL -3

..... Appellant

Through: Mr. Ashok K. Manchanda, Senior
Standing counsel with Ms. Vibhooti Malhotra,
Advocate.

versus

DREAMLAND BUILD TECH P. LTD.

..... Respondent

Through: Dr. Rakesh Gupta and Mr. Somi
Agarwal and Ms. Monika Ghai, Advocates.

AND

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ITA 886/2015

PR. COMMISSIONER OF INCOME TAX,

ITA Nos. 829/2015, 908/2015 & 886/2015

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CENTRAL -3

..... Appellant

Through: Mr. Ashok K. Manchanda, Senior
Standing counsel with Ms. Vibhooti Malhotra,
Advocate.

versus

DREAMLAND BUILD TECH P. LTD.

..... Respondent

Through: Dr. Rakesh Gupta and Mr. Somi
Agarwal and Ms. Monika Ghai, Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

26.04.2016

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1. These three appeals by the Revenue are directed against the impugned common order dated 12th December 2014 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 2596/Del/2010, 3115/Del/2010 and 3116/Del/2010 for the Assessment Years ('AYs') 2006-07 and 2007-08 (two of the appeals before ITAT being the Assessee's appeals).

2. The common question sought to be urged in these appeals by the Revenue is whether the ITAT was justified in treating the income earned by the Assessee from the shares in which it invested its surplus funds as 'Short Term Capital Gains' and not under the head 'Income from Business and Profession'?

3. The Assessee Company was incorporated on 19th October 2004. In the first AY i.e. 2005-06 it declared income from the investment in shares as

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‘Short Term Capital Gains’. It, however, did not commence its main business activity i.e. business in real estate.

4. The Assessee filed its return of income for AY 2006-07 on 23rd November 2006 and for AY 2007-08 on 31st March 2008 declaring a total income of Rs. 1,75,51,496 and Rs. 5,97,49,161 respectively. The returns were picked up for scrutiny and the assessments were completed at Rs. 1,76,83,310 for AY 2006-07 by the assessment order dated 22nd December 2008 and at Rs. 13,24,67,540 by the assessment order dated 30th November 2009 for AY 2007-08. The income from the investment in shares was treated as business income. According to the Assessing Officer (‘AO’) the transactions were regularly entered during the years under consideration and the purchase and sales of shares were not occasional but continuous. It was observed that none of the shares were held for more than one year and, therefore, it revealed the intention of the Assessee not to hold it as investment and to earn dividends but to earn profits by sale and purchase of shares. For AY 2006-07, the AO held that since the Assessee had claimed Rs.2308 as speculation loss, it reveals the intention of the Assessee to trade in shares. The other factor which weighed with the AO was that no separate books of account were maintained for the alleged investments and regular business.

5. The appeals filed by the Assessee for the aforementioned assessment orders were dismissed by the Commissioner of Income Tax (Appeals) [‘CIT (A)’] by separate orders dated 1st April 2010. The CIT (A) held that the gain arising on sale of share purchase for a period of less than 30 days should be

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assessed as income from business and not Short Term Capital Gains. Accordingly, the profit earned by the Assessee on sale of shares within a period of 30 days from the date of purchase was treated as business income. Also the amount earned as surplus after a period of 30 days was treated as Short Term Capital Gains. Aggrieved by the above orders of the CIT (A) both the Assessee and the Revenue filed the appeals before the ITAT.

6. The findings of the ITAT, inter alia, were that the shares and securities were classified as investments in the balance sheet and the investments were not made out of any borrowed funds. It further noted that gains derived from the purchase and sale of shares by the Assessee was rightly offered to tax under the head capital gains and not business income. It was also noted that in the order under Section 143(3) of the Act passed by the AO for the AY 2005-06, similar gains were declared under the head Capital Gains by the Assessee and were accepted.

7. Mr. Ashok K. Manchanda, learned counsel for the Revenue submits that nearly 96% of the total available funds for the AY 2006-07 was utilised for sale and purchase of shares. Likewise for AY 2007-08, 86.58% was utilised in similar fashion. Secondly, without commencing any business in terms of the main objective i.e. real estate business, the Assessee had increased its authorised share capital and claimed the preliminary expenses in that connection as revenue expenses in terms of Section 35D of the Act. This by itself according to him belied the claim of the Assessee that only surplus funds were invested in the sale and purchase transactions of shares. It was submitted that considering the value of the transactions and the quantum of

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profit earned by the Assessee, it could not be said that the Assessee intended to earn dividends by investing in shares. Reliance has been placed by Mr. Manchanda on the decisions in *CIT (Central) v. Associated Industrial Development Company (P) Ltd (1971) 82 ITR 586 (SC)*, *Commissioner of Income Tax, Bombay v. H. Holck Larsen (1986) 160 ITR 67 (SC)* and the decision of the Authority for Advance Rulings in the case of *Fidelity Northstar Fund (2007) 288 ITR 641 (AAR)*. He also referred to the Central Board of Direct Taxes ('CBDT') guidelines issued on 13th December 2005.

8. There are certain factual aspects which have to be first considered before the above submissions of Mr. Manchanda can be examined. This has been adverted to by the ITAT in the impugned order. For the AY 2006-07, the sum of Rs.1,75,51,496 was earned by the Assessee out of 41 shares/securities which could be classified as under:

- “(i) Rs.1,01,92,939 on shares held for more than 90 days;
- (ii) Rs.19,03,596 for shares held between 61 to 90 days and Rs.18,45,019 for shares held between 31 to 60 days and Rs.36,09,941 for shares held below a period of 30 days.”

9. It was thus noted by the ITAT that the finding of the AO that the Assessee was holding majority of the shares for a period between 10 days and 1 month was factually incorrect. The ITAT also had referred to a number of judgements of the Supreme Court including *G. Venkateswami Naidu, Co. v. CIT (1959) 35 ITR 594 (SC)* and *CIT v. Sulej Cotton Mills Supply Agency Ltd (1975) 100 ITR 706 (SC)*, *Commissioner of Inland Revenue v. Fraser (1942) 24 TC 498*, *Raja Bahadur Kamakhya Narain Singh v. CIT (1970) 77 ITR 253 (SC)* and *Karam Chand Thapar & Bros. (P) Ltd. v. CIT (Central) (1971) 82 ITR 899 (SC)*.

10. The ITAT also referred to the decision of the Lucknow Bench of the ITAT in *Sarnath Infrastructure P.Ltd. v. ACIT, (2009) 313 ITR (AT) 13 (Lucknow)* which carved out the principle to determine whether a transaction is in the nature of trade or are for merely investment purposes. After analysing a large number of judgments of the Supreme Court, the tests as culled out by the ITAT included the following:

- (i) what is the frequency of the purchase and sale of shares.
- (ii) ratio between purchases and sales and the holdings which show whether the Assessee is trading or investing.
- (iii) high transactions may indicate trade whereas low transactions may indicate investments.

11. The CBDT guidelines dated 13th December 2005 also summarises these very principles and emphasises that there cannot be any one particular factor which can be taken into consideration for determining the question whether the shares have been held as investment or the intention of the Assessee is to trade in shares and to earn profits. Among the factors highlighted by the CBDT are the scale of the activity and whether transactions were entered continuously and regularly during the assessment year.

12. In response to the query by the Court whether there is any determination by the AO as regards the frequency of the transactions, Mr. Manchanda stated that this aspect of the matter was perhaps not examined by the AO.

13. In the considered view of the Court this was one of the crucial factors which ought to have been weighed with the AO before coming to the

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conclusion that the earnings of the Assessee were not from the investment of the shares but business income. Merely because 41 shares/securities were bought and sold could not *per se* lead to the conclusion that the earnings therefrom were not Short Term Capital Gains but business income. The mere percentage of the investment from the available surplus funds of the Assessee could not be by itself be determinative of the issue. One important factor would be how frequently the Assessee was purchasing shares during the relevant AY. This crucial factor does not seem to have been addressed by the AO.

14. Although Mr. Manchanda repeatedly stressed that the ITAT had gone only by the order passed by the AO for AY 2005-06 whereas the said assessment had been reopened subsequently under Section 153A of the Act, but in the considered view of the Court, independent of that fact, the finding of the ITAT that the earning of the Assessee was only a Short Term Capital Gains does not suffer from any legal infirmity. No substantial question of law arises for determination.

15. The appeals are accordingly dismissed.



S. MURALIDHAR, J



VIBHU BAKHRU, J

APRIL 26, 2016

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