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

\+ ITA 144/2017 & CM No. 5133/2017

THE PR. COMMISSIONER OF INCOME TAX -4 ..... Appellant
Through: Mr. Ruchir Bhatia, Adv.

versus

M/S GDA FINVEST & TRADE P. LTD. ..... Respondent
Through: Mr. Ved Jain, Mrs. Rano Jain and Mr. Pranjal Srivastava, Advs.

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

**O R D E R**

**% 10.03.2017**

1. The question which the Revenue urges is whether in the circumstances the ITAT's findings that the amount declared by the assessee as short-term capital gain was erroneously accepted instead of the proper inference that it was business income.

2. The assessee had *inter alia* reported a gain of ₹ 95,92,653/- for the given period i.e. AY 2006-07. In addition, the assessee had reported a much smaller figure as interest amount. The AO brought to tax larger amount as business income rejecting the assessee's contention that it was short-term capital gain. In doing so, the AO merely relied upon the rulings of the Supreme Court in ***G.Venkata Swami Naidu & Co. V. CIT(1959) 35 ITR 594 (SC)*** as well as in ***Sardar Indra Singh & Sons Ltd. Vs. CIT (1953) 24 ITR 415 (SC)***. After recounting the principles, the AO found as follows:

> *".... The aforesaid principles as laid down by the Hon'ble Supreme Court are clearly and squarely applicable in the case of the assessee. On perusal of details filed by the assessee company it is seen that the short term capital gain earned by assessee Company is squarely covered by above principle of Hon'ble Supreme Court and it cannot be treated under the head 'Income from Short term capital gain'.*
>
> *In view of the detailed discussion made above, it is held that the entire gains derived by the assessee from the purchase and sale of shares amounting to Rs. 9592653/- which has been claimed by the assessee as short term capital gain is taken as business income of the assessee and charged to tax accordingly. Since I am satisfied that the assessee has filed incorrect particulars of its income, penalty proceedings under section 271(l)(c) are being initiated separately...."*

3. The assessee's appeal succeeded before the CIT(A) which accepted its plea that the amount was to be treated as short-term capital gain rather than as business income.

4. The ITAT had to deal with the Revenue's appeal which made a bald ground for averment that instead of short-term capital gain the same had to be brought to tax as business income. In paras 10 to 14 of the order, the ITAT discussed the relevant facts as discerned by it and held *inter alia* as follows:

> *"..... 11. It is an admitted fact that the assessee during the year has earned long term capital gain of Rs.14,27,860/-. This long term capital gain has been accepted by the A0 and whereas the short term capital gain has been assessed as business income. From the assessment order, we find that no reason has been*

*given by the AO to treat these two differently. From the balance sheet of the assessee company of this year and also earlier years it is evident that all along the assessee has been making investment in shares and the same have been declared as investment. These transactions have been accounted for in the books of account as investment. The dividend earned on such investment has been declared separately. From the details filed by the assessee and available on record we note that there are no multiple transactions. The assessee has made investment and after a period of time the same have been sold. Depending upon the period of holding the gain arising thereon have been declared as long term capital gain and short term capital gain. From the details it is also evident that there are only few scripts in which assessee has made investment. There are no repeated transactions in the same script. There does not appear to be any organized activities as is normal in the case of a trader. There is no intra-day transaction......*

*....... 13. An income has to be assessed under a proper head as per the*

*provisions of the Income Tax Act. As per Section 45(1) of the Act, any gain arising on transfer of a capital asset is to be taxed as capital gain. Further section 2(14) define capital asset to mean property of any kind held by an assessee whether or not earmarked for his business or profession, but does not include any stock in trade, consumable stores or raw material held for the purpose of business. Thus the gain arising on capital asset falling within the meaning as defined in Section 2(14) is to be charged as capital gain.*

*14. In the present case as is evident from the facts on record, the investments in shares were held as capital asset. The assessee has accounted for these investments in shares as capital asset in its books of accounts. The* *same has also been declared in the financial statements as capital asset. These financial statements have been audited and also have been approved by the shareholders filed with the Registrar of Companies. The books of accounts and the audited financial statements have evidentially value and what is recorded therein cannot be disturbed lightly. The income arising on sale of capital asset, as stated hereinabove, has to be assessed under Section 45(1) as capital gain and accordingly the CIT(A) was right in holding that gain arising on sale of investment will be chargeable as capital gain and not as business income.....”*

5. The Revenue urges that the ITAT had acted in error in rendering factually incorrect findings contrary to the records and, therefore, this Court needs to interfere with the impugned order.

6. The Court is of the opinion that having regard to the concurrent nature of findings, under the circumstances the ITAT concededly went by the record, it cannot be contended that there is an error of law or a substantial error of law required under Section 260A of the Act.

7. The appeal is, therefore, dismissed.

**S. RAVINDRA BHAT, J**

**NAJMI WAZIRI, J**

**MARCH 10, 2017**/kk