

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.485 OF 2016

Pr.Commissioner of Income-Tax-II ... Appellant

V/s.

M/s Viksit Engineering Ltd. ... Respondent

Mr.Ashok Kotangle for the Appellant.

**CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : NOVEMBER 26, 2018.**

P.C.:-

1. This appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 8th July, 2015 passed by the Income Tax Appellate Tribunal. This appeal relates to the Assessment Year 2008-09.

2. Mr.Kotangle, learned counsel to the Revenue urges the following brief question of law:-

“Whether in the facts and circumstances of the case and in law was the Tribunal justified in holding that the gain made on sale of shares is

to be classified as short term capital gain and not as business income?”

3. In the subject assessment year the Respondent in its return of income claimed short term capital gain of Rs.9.42 crores. During the assessment proceedings the Respondent was called upon to show cause as to why the income shown as short term capital gain should not be treated as business income. The Respondent pointed out that its regular business is to trade in engineering goods, metal and other commodities. It has also made investments in shares over the last 10 to 15 years out of its own funds i.e. without any borrowings and loans. However, the Assessing Officer did not accept the same on the ground that all the scrips in respect of which the short term capital was gained was held for a very short period i.e. purchased and sold during the year.

4. Being aggrieved the Respondent carried the issue in appeal to the Commissioner of Income Tax (Appeal)(CIT (A)) but without success.

5. On further appeal to the Tribunal by the impugned order dated 8th July, 2015, the appeal was allowed. This after examining the facts and finding that in its Balance-sheet and profit and loss account the respondent had separately shown trading in shares, long term capital gains and profits from business. It further records the fact that in this case the gains on account of short term capital gain i.e. the investments held for a period of less than 12 months arises on account of the fact that a prudent investor keep a watch on the market and liquidates its investment as and when necessary. It records the fact that the law itself provides that such gain may be brought to tax under the head short term capital gain when the shares are held for a period of less than 12 months. It also records that fact that for earlier years, the Assessing Officer had accepted the claim made under the head short term capital gain in respect of purchase and sale of shares.

6. Mr.Kotangle, learned counsel for the Revenue submits that the appeal ought to be admitted as the amounts involved are large. Besides the profit claimed under the head short term

capital gain are all on account of purchase and sale of shares during the assessment year.

7. We note the fact, that the issue of classification of income on sale of shares as business income or as short term capital gains is to be decided the facts of each case. The tests to be applied for such determination is provided in CBDT Circular No.4 of 2007. We note that the Tribunal kept in mind the tests as provided in the above Circular in the context of the facts and found is that these investments were out of its own funds and not borrowed funds, further it maintained a distinction between trading in shares and investments. Thus two portfolios one for "Investment" and other for "Trading". Besides for the earlier years the Revenue accepted the claim of short term capital gain. Thus the income has to be taxed as short term capital gain. We are of the view that respondent holding the shares for a short period, will not convert the capital gain into business income. This would be contrary to be legislative mandate which itself provides that when the investment is held for less than 12 months, it is to be termed as short term capital gain. Moreover, the impugned order

of the Tribunal also in the present facts correctly placed reliance upon the decision of this Court in the case of **CIT Vs. Gopal Purohit¹**.

8. In the above facts, the view taken by the Tribunal on the facts is a possible view. Thus, the question as proposed does not give rise to any substantial question of law. Thus not entertained.

9. Accordingly, appeal dismissed. No order as to costs.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)

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