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

\+ ITA 229/2018, C.M. APPL.7033/2018

MAHESH CHANDRA AGRAWAL ..... Appellant

Through : Sh. Rajesh Mahna, Sh. Manu Giri, Sh. Ramanand Roy, Sh. Rohit Sharma and Sh. Vikram Kakkar, Advocates.

versus

THE ACIT CIRCLE 59(1) NEW DELHI ..... Respondent

Through : Sh. Balkishan Ladhania and Sh. Raghavendra Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

ORDER

% 06.04.2018

The assessee's appeal under Section 260A of the Income Tax Act, 1961 [hereafter "the 1961 Act"] challenges an order of concurrent finding which rejected the contention that ₹65,55,066/- was short-term capital gain [for Assessment Year (AY) 2006] and assessed it as business income.

The facts are that during the AY concerned, the assessee had reported a total income of ₹73,94,138/-. He showed income under several heads, which included capital gains etc. The Assessing Officer (AO), after considering the material on record, was of the opinion that the amount claimed as short-term capital gains really ought to be treated as business income. In so concluding, the AO took into account the nature of the share transactions and the irregularities. He also noted that the purchases were made out of borrowings and also took into account the average period for which the shares were held and the total volume of the transactions. The assessee's appeal met with the same fate; the CIT(A) again reported all the circumstances and concluded that the amounts claimed as short term capital gains were not derived out of the investment but in fact amounted to business income.

Both the CIT(A) as well as the AO had taken note of the Central Board of Direct Taxes (CBDT) instructions of 31.08.1989 as well as the Circular No.4/2007 which dealt with what elements were to be taken into consideration in analysing whether the amounts claimed as short term capital gains were in fact so or were they business income. The ITAT whom the assessee approached, also followed the same principles and rejected the appeal.

Sh. Rajesh Mahna, learned counsel contends that the assessee was not primarily engaged in the activity of share business and rather was able to, with some research, read the five scrips in question and make strategic investment. It was submitted that the tests in question were wrongly applied by the Revenue authorities. Learned counsel relied upon *CIT v. Vinay Mittal* 2012 (208) Taxmann 106 (Del).

In the present case, the AO pertinently noted that even though the assessee had dealt with only five scrips during the year in question, there were no less than 331 transactions; the AO, in fact, prepared a chart, in respect of the shares and the number of transactions recorded to each, is extracted below.

Name of the Scrip	***No. of times purchase during AY 06-07***	***No. of times sold during AY 06-07***	***Total transactions during AY 06-07***
Bajaj Hindustan Ltd.	*28*	*25*	*53*
CCL Products Ltd.	*6*	*10*	*16*
GHCL Ltd.	*30*	*23*	*53*
Titan Industries Ltd.	*20*	*20*	*40*
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This Court notes that the AO was cognizant of the CBDT's circular which outlined no less than ten elements which the Revenue authorities are to consider in appreciating, whether or not, capital gains reported by the assessee are in fact so or do they really amount to a business income. The said ten elements are as follows:

> *"(i) Whether the purchase and sale of securities was allied to his usual trade or business/was incidental to it or was an occasional independent activity.*
> *(ii) Whether the purchase is made solely with the intention of resale at a profit or for long term appreciation and/or for earning dividends and interest.*
> *(iii) Whether scale of activity is substantial.*
> *(iv) Whether transactions were entered into continuously and regularly during the assessment year.*
> *(v) Whether purchases are made out of own funds or out of borrowings.*

(vi) Average holding period for securities bought and sold.
(vii) Time devoted to the activity and the extent to which it is the means of livelihood.
(viii) The characterization of securities in the books of the account and in balance sheet as stock in trade or as an investment.
(ix) Total numbers of stocks dealt in.
(x) Whether money has been paid or received or whether these are only book entries."

Having regard to the concurrent findings rendered on proper application of the law and the relevant circulars, the Court is of the opinion that no question of law arises. The appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

APRIL 06, 2018/ajk