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

Date of decision: 15.03.2018

+ ITA 86/2018 and CM APPL.2794-2795/2018

SHRI RAKESH KUMAR GUPTA Appellant
Through Appellant in person.

versus

THE COMMISSIONER OF INCOME TAX -XIII & ANR.

..... Respondents
Through Mr. Zoheb Hossain, Sr. Standing
Counsel with Mr. Deepak Anand, Jr.
Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)

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1. The question of law sought to be urged as whether the assessee's claim of Short Term Capital Gain of ₹ 37,11,501/- sought to be set off against Short Term Capital Loss of ₹45,60,673/- in the preceding year was unjustifiably denied by the lower appellate authorities.

2. The assessee reported *inter alia* income from various sources including substantial capital gains for AY 2010-11. Upon scrutiny, it

was urged on its behalf that substantial purchases of shares were not based upon delivery but the gains/losses were on the basis of daily transactions. It is submitted that as far as the gains were concerned, the assessee reported such income on the basis of capital gains in its investment portfolio. The Assessing Officer (AO) rejected the assessee's contentions and characterised the sum/income reported as business income towards capital gains and capital loss. In doing so, the AO took note of the detailed transactions that the assessee had entered into including the volume of shares traded, the duration held, the dividends earned etc. He also considered the assessee's submission that separate portfolios for business and investment were maintained. The AO's findings were confirmed by the CIT(A), who too independently analysed the facts and concluded that the income reported had to be characterised as business income.

3. The assessee's appeal to the ITAT was unsuccessful; the Tribunal reasoned as follows :

“7. After hearing both the parties and perusing the materials available on record and the orders of the authorities below, we find that during the year, the assessee has purchased and sold the shares of Rs.22.03 crores and odd and Rs.24.12 crores and odd respectively. Some of the shares of Axis Bank were purchased in the previous year, out of which some were sold and balance has been shown as on 31.03.2009. On examination of the tables reproduced above, we observe that the assessee has made purchase of shares 57 times and sale of shares 59 times. There are several instances when the assessee has purchased the shares and sold them either the same day or after

a few days. In most of the cases, the assessee has done intraday transactions. From the balance sheet filed by the assessee for the impugned year placed at paper book page-33, we find that the shares held by the assessee are reflected as under :

<i>SI No.</i>	<i>Name of the Company</i>	<i>Value as on 31.03.09</i>	<i>Value as on 31.03.10</i>
<i>1</i>	<i>Abhishek Ind. (100)</i>	<i>1000</i>	<i>1000</i>
<i>2</i>	<i>Bhageerath Engg. (100)</i>	<i>1000</i>	<i>1000</i>
<i>3</i>	<i>CCAP Ltd. (100)</i>	<i>1000</i>	<i>1000</i>
<i>4</i>	<i>Shoppers Inv. & Finance Ltd. (100)</i>	<i>1000</i>	<i>1000</i>
<i>5</i>	<i>Videocon International (8)</i>	<i>1000</i>	<i>1000</i>
<i>6</i>	<i>Other Shares-Singhal Fincap</i>	<i>35243.30</i>	<i>35243.30</i>
<i>7</i>	<i>Others Shares – K.K.Securities</i>	<i>17162647.84</i>	<i>0</i>

From the above part of the balance sheet, it is clear that there is no change in the shares of some companies, which remained as it is in F.Y. 31.03.2009 and 31.03.2010. In case of other shares – K.K. Securities, the assessee had value of shares at Rs.1,71,62,647 /- as on 31.03.2009 but up to the impugned year, the assessee has sold all the shares. On perusal of the computation filed by the assessee and the capital account, the assessee has not received any dividend during the year. The assessee has received only dividend of Rs.350/- in F.Y. 31.03.2009. In view of the characteristics of share transactions undertaken by the assessee, we do not find any justification to discard the findings reached by the authorities below on this issue ”

4. The petitioner, who represents himself, firstly urges that the findings of the lower appellate authorities are facially in error of law because they overlooked the circumstance that for the past years similar transactions were accepted as capital gain. There being no challenge in the nature of the transactions, assessee could not have been subjected to different treatment for the assessment year in question.

5. Secondly, it was urged that the AO's over-emphasis on the duration of holding also overlooked a significant fact that the appellant in fact did not take delivery of the shares and a majority of them, were transacted during the day. As far as the others that were reported as capital investments, the assessee maintained separate books which meant that his intention was to segregate the investments from the other transactions. The assessee sought to rely upon the decision of the Bombay High Court in *Commissioner of Income Tax vs. Gopal Purohit*, (2010)188 Taxman 140 (Bom).

6. It is apparent from the above factual narrative that the Revenue authorities - including the CIT(A) and the ITAT carried out a detailed analysis of the transactions in question including the volume of holding, duration of holding and the dividend earned and other essential details. The lower authorities-including the AO considered the cumulative effect of these factors and also all the relevant authorities, starting from the judgment of the Supreme Court in *Raja Bahadur Visheshwara Singh vs. Commissioner of Income Tax*, (1961) 41 ITR 685 (SC). In this background the assessee's assertion that the

previous year's assessment-which had accepted the reporting of the transaction which he claims to be identical, is unpersuasive. The previous year's assessment order (for AY 2008-09) in fact did not lead any discussion on this aspect and appear to have merely accepted the assessee's contention. Those cannot by any stretch of imagination be conclusive. At any rate in such cases, one cannot apply the principle of *res judicata* or *estoppel*.

7. For these reasons, the Court is of the opinion that no substantial question of law arises. What is urged related to pure appreciation of facts. The appeal is therefore dismissed. All the pending applications also stand disposed of.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

MARCH 15, 2018

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