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

INCOME TAX APPEAL NO.1281 OF 2016

Envision Investment & Finance P. Ltd.
Now know as :
Envision Investment Consultants P. Ltd. : Appellant.
versus
Deputy Commissioner of Income Tax-9(1)
Mumbai : Respondent.

WITH
INCOME TAX APPEAL NO.1303 OF 2016

Envision Investment & Finance P. Ltd.
Now know as :
Envision Investment Consultants P. Ltd. : Appellant.
versus
Addl. Commissioner of Income Tax-9(1)
Mumbai : Respondent.

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Dr.K Shivram, Senior Counsel i/by Mr. Sameer G Dalal for the Appellant.
Mr. Ashok Kotangle a/w Mr. Prabhakar Ranshur for the Respondent

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CORAM : AKIL KURESHI &
M.S.SANKLECHA, JJ.

DATE : FEBRUARY 27, 2019.

P.C.:

1 These Appeals arise in common background and are filed by the same assessee. They are being heard together and would be disposed of this common order. For convenience we may refer to the facts arising in Income Tax Appeal No.1281 of 2016 which concerns Assessment Year 2007-2008.

2 These Appeals are filed by the Appellant – Assessee against the Judgment dated 01/01/2016 of the Income Tax Appellate Tribunal (in short "the Tribunal"), raising the following question for our consideration:-

> "Whether on the facts and in the circumstances of the case, and in law, the Tribunal was justified in directing the Respondent to treat the gain of Rs.20.91 crores arising on sale of share as Business income as against Short Term Capital Gain declared by the Appellant."

3 The issue arises out of the Judgment of the Tribunal concerning the question of treatment to the gain earned by the Assessee out of the sale of shares. In so far as the shares which the Assessee had held in excess of one year, the Commissioner of Income Tax (Appeals) (for short "CIT (Appeals) had held in favour of the Assessee and treated the gain as Long Term Capital Gain. However, with respect to those shares, which the Assessee had sold within a period of one year, the gain was treated as arising out of business. The Tribunal confirmed the view of the CIT (Appeals) and treated such gain as Assessee's business income. This has given rise to the filing of the present Appeal by the Assessee. The Tribunal while confirming the view of the CIT (Appeals) in this respect made the following observations :-

> "2.4 We have heard rival submission and we perused the record. We have heard the rival submissions and perused the material before us. In our opinion, no single factor can decide the issue as to whether a

particular transaction can be assessed under the head business or capital gain as far as share transactions are concerned. Judgments after judgments have held tghat the issue has to decided after considering various factors like volume of transaction, holding period, magnitude of purchase of sales, ratio between purchase and sales and the accounting factor is intention of the assessee and the intention can be gathered from the different variables. In short, there is no readymade formula to decide the issue and each case has to be decided on its own facts. Treatment given to share transactions by the AO in the earlier and subsequent years can be one of the deciding factors, but in itself it is not the conclusive proof. Unless and until it is not proved that the facts of a particular A.Y. were identical to facts of other years. Courts have held that a single transaction can be held as business transaction and a series of transactions can be held to a capital gain transaction. In short the facts of a particular year have to be tested on the touchstone of the general principles laid down by various authorities and summarized in the Circular issued by the CBDT.

We find that out of the total profit of 21.05 Crores the assessee had earned profit of Rs.20.09 Cores from purchase and sale of one script. In case of Glenmark Pharma Ltd., Reliance and RCVL there are repetitive transactions (Pg. 9-10 of the Paper book). The shares of Reliance were sold on 19.04.2006 for the first time. On 16-01-2006 the assessee purchase3d 99,000 shares of same company and same were sold on 19.05.2006 and 01.06.2006. Shares of Glenmark were traded more than once. The volume of the shares and repetitive nature of the sale and purchase of shares indicate the intention of the assessee. In our opinion, the assessee was dealing in shares as a treader rather than a investor. Considering the upward swing in the share market it purchased shares of a particular company in bulk and within a short span of time sold them and earned a huge profit. The FAA had found that the assessee had purchased shares worth Rs.70.39 corres and sold the shares worth Rs.91.44 Crores. The surrounding circumstances clearly prove that the assessee was not making investment in these shares. These were pure and simple business transactions. We have also considered the dividend earned by the assessee during the year under appeal. In our opinion, facts of the case of Niraj A Surti (supra) are not applicable to the case under consideration. Therefore confirming the order of the FAA, we decide ground no.1 against the assessee."

4 A perusal of the above quoted portion of the Tribunal's Judgment would clearly show that the Tribunal had taken into account all the relevant factors for coming to a conclusion that sale of shares resulted into business income of the assessee. The Tribunal noted frequency of purchase and sale of shares, quantum of sale and purchase of shares and the relevant gains besides other factors in order to come to a conclusion that the assessee had intended to engage itself in the business of buying and selling the shares. We do not find

any error in the view taken by the Tribunal, since the Tribunal had noted in its Judgment all the factors in coming the conclusion, which are factual in nature, and with respect to which no perversity is demonstrated.

5 The learned counsel for the assessee however contended that in the later year the assessee had suffered loss in the process of selling the shares which was declared as cpital loss. The Assessing Officer in the assessment after scrutiny accepted this declaration of the assessee and therefore the department is acting inconsistently which is not permissible. The issue of the assessee suffering loss in the subsequent year arose after the assessment in the present year was completed. Quite apart,if in the later year the assessee had declared a loss on capital side, we wonder whether going against such a self declaration of the assesee, the Assessing Officer had to foist upon the assessee the conclusion that the loss was a business loss. If at all, it was up to the assessee to claim it as business loss if the assessee was satisfied with the gain being taxed as business income. Be that as it may, this would not be determinative factor in so far as the present Appeals are concerned.

6 In the result, the Appeals are dismissed.

[M.S.SANKLECHA,J.] **[AKIL KURESHI, J]**