

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

INCOME TAX APPEAL NO.40 OF 2017

Principal Commissioner of Income Tax-20 Appellant

versus

Hiren M. Shah ... Respondent

.....

- Mr.A.K. Saxena, Advocate for Appellant.
- Mr.H.R. Shah, Advocate for Respondent.

**CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.
DATE : 01st APRIL, 2019.**

P.C. :

1. The Revenue is in Appeal against the judgment of Income Tax Appellate Tribunal. Following question was presented for consideration;

“Whether on the facts and circumstances of the case and in law, the Hon'ble Tribunal ITAT erred in holding the gain of Rs.13,047,76,692/- on account of sale of shares as Long Term Capital Gain?”

2. The Respondent-Assessee is an individual. Assessee had filed return for the assessment year 2008-2009, in which the assessee had shown a gain of Rs.13.04 Crores, by way of sale of shares as long term capital gain. The Assessment Officer rejected the claim holding that the same was assessee's business income. The Appeal filed by the assessee was dismissed by the Appellate authority, upon which the issue reached the Income Tax Tribunal. Tribunal allowed the Appeal making following observations;

“5. We have heard the rival contentions and also perused the relevant material placed on record. Here in this case, the assessee had shown long-term-capital-gain mostly on 3 scripts and particularly from the sale of script of M/S Pyramid Saimira. The assessee has bought these shares through IPO for sums aggregating Rs.1,20,00,000/- in the month of May & November, 2006. This stock had a lock-in-period of 12 months from the year of launch of the said company in Bombay Stock Exchange. These shares have been sold during the month of March, 2008 for a consideration of Rs.14,16,86,117/-, thereby earning a gain of Rs.12.97 crores. The AO at page 11

of the order had noted the order of SEBI wherein it has been found that the promoter of “Pyramid Saimira” had forged letter for rigging the share price. From the perusal of the SEBI order, it is seen that the said order is dated 16.04.2009 and the alleged rigging of the sale price has been done in the month of December, 2008, whereas the assessee had already sold its shares before the month of March, 2008, hence no adverse inference of such an event can be drawn. In any case, the AO and CIT(A) have based their order on the issue of treatment of long-term-capital-gain as 'business income'. As pointed out earlier, the assessee had purchased the lot of shares of “Pyramid Saimira” through IPO and once that is so, then the normal presumption is that it is mostly done by an investor for the purpose of investment as there is less risk of loss and also it fortifies the intention that it is for the purpose of treating it as an investment and not as a stock-in-trade. Here in this case as pointed out by ld. Counsel the average period of holding of most of these shares is 628 days which is fairly a long period. In certain scripts assessee had also incurred loss. On these facts and circumstances, it can be very well held that the assessee's intention for purchasing the shares was purely for investment and to earn gain

on a long term investment. Not only this, in earlier years also the assessee's investment in shares have been held to be assessed under the head "capital gain", because consistently assessee has been showing investment in shares in his personal Balance sheet purchased out of his own surplus fund. As pointed out by Ld. Counsel, the Ld. AO has misled himself by taking the Balance sheet of the Proprietary concern wherein the assessee had shown certain loan, whereas the investment have been made through personal account which is reflected in the personal Balance sheet, wherein there are sufficient own fund for making the investment. Thus, on these facts and circumstances, we hold that the shares which have been held as "investment" in the Balance sheet are to be treated as assessable under the head "capital gain" and not as 'business income'. Accordingly, ground no.1 & 2 are treated as allowed."

3. Perusal of the documents on record would show that the Tribunal took into account relevant factors to come to the conclusion that the sale proceeds were in the nature of capital gain. These relevant factors were that the assessee had received

such amounts upon sale of three scripts and in particular one of M/s Pyramid Saimira. The assessee had purchased such shares and held them for over 12 months. Against the locking period of one year, the assessee had held shares for 17 months before sale. The assessee had not utilized any borrowed funds for such purchase and that in the earlier years, the Assessing Officer had accepted the sale of shares giving rise to capital gain. We do not find that the Tribunal has committed any error.

4. Learned Counsel for the assessee also relied on the CBDT Circular dated 29/02/2016, which also supports Tribunal's decision. In the circular the CBDT had clarified that in relation to shares held for more than 12 months, which are listed shares, if the assessee wishes to treat them as investments giving rise to capital gain upon sale, the department would not dispute the same as long as the assessee follows the same pattern subsequently.
5. In the result, the Income Tax Appeal is dismissed.

(SARANG V. KOTWAL, J.)

(AKIL KURESHI, J.)