

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

SPECIAL JURISDICTION (INCOME TAX)

ORIGINAL SIDE

RESERVED ON: 06.09.2022

DELIVERED ON: 15.09.2022

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE SUPRATIM BHATTACHARYA

ITA/79/2010

JET AGE SECURITIES PRIVATE LIMITED

VERSUS

COMMISSIONER OF INCOME TAX, KOLKATA-III

Appearance:-

Mr. J.P. Khaitan, Sr. Adv.

Mr. Sanjay Bhaumik, Adv.

Mrs. Swapna Das, Adv.

Mr. Siddhartha Das, Adv.

.....For the Appellant.

Mr. Tilak Mitra, Adv.

.....For the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. This appeal filed by the assessee under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated October 28, 2009 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata (Tribunal) in ITA No. 1563/Kol/2008 for the Assessment Year 2005-06. The appeal was admitted on 31.03.2010 to decide the following substantial question of law:

"Whether the Tribunal was justified in law in holding that the gain of Rs. 2,52,87,056/- made by the appellant from shares held as investments was business income and not short term capital gains as claimed by the appellant and its purported findings in that behalf and reversing the order of the Commissioner of Income Tax (Appeals) are arbitrary, unreasonable and perverse?"

2. We have heard Mr. J.P. Khaitan, learned Senior Advocate assisted by Mr. Sanjay Bhawmik, Mrs. Swapna Das and Mr. Siddhartha Das, advocates for the appellant assessee and Mr. Tilak Mitra, learned Senior Standing Counsel for the respondent.
3. The Assessee was engaged in the business of stock broking, investment in shares and mutual funds from which income by way of dividend was earned. The assessee claimed short-term capital loss on sale of units of mutual fund of Rs. 1,68,19,921/-. The assessee received dividend in respect of the said units of mutual fund of Rs. 1,50,79,850.06/-.
4. The assessee had furnished the details pertaining to the purchase of units of mutual fund, giving the date of purchase, record date, dividend received, dates of sale and the loss on sales of the units of mutual fund. The

Assessing Officer referring to Section 94(7) of the Act, as amended by Finance (No. 2) Act with effect from 01.04.2005 stated that the assessee acquired the units within a period of 3 months prior to the record date and sold them within a period of 9 months after the record date, therefore, disallowed the loss to the extent of dividend of Rs. 1,50,79,850/- and added the same to the assessee's total income. Aggrieved by such order, the assessee preferred appeal before the Commissioner of Income Tax (Appeals), VIII, Kolkata [CIT(A)]. The CIT(A) on considering the facts held that the assessee has been investing in shares out of its own funds all along from its inception and the shares have been kept in the balance-sheet of the company and the books of accounts under the investment portfolio and has been valued at cost all along. Further it held that the assessee is being assessed under the head of Long Term Capital Gains and Short Term Capital Gains in respect of its holdings in shares and securities and the own funds of the assessee were sufficient enough for investing in shares and securities. Further the CIT(A) observed that the Assessing Officer himself has treated the investment for more than 12 months to be falling under the head of Capital Gains and only because some shares were sold within the period of 12 months giving rise to income from Short Term Capital Gains, the Assessing Officer held that the income arising therefrom was income from business which according to the CIT(A) was "heads I gain and Tails you lose". Further, on noticing the facts the CIT(A) held that in the earlier years the assessee has paid tax at normal rates on income from short term capital gains and the rule of consistency requires the same treatment to be metted to a particular source of income unless there is a change in law or a mistake

has occurred in the previous assessment. Thus, the CIT(A) held that the assessee has proved its bona fide as an investor of shares and taking totality of the facts into consideration, the assessee was allowed to compute the income arising from purchase and sale of shares to be income arising from investment chargeable to tax as Capital Gains. The appeal accordingly stood allowed. The Revenue filed appeal before the Tribunal challenging the said order. It was contended by the revenue that Clause (b) of Section 94(7) as amended provides the period for which the units are required to be held for more than 9 months from the record date as against the period of 3 months prior to the amendment. It was further submitted that the assessee admittedly purchased the said units of mutual funds within 3 months from the record date and sold the same within 9 months after the record date and, therefore, the Assessing Officer was justified in disallowing the loss arising on the sale of units to the extent of dividend income.

5. The assessee while supporting the order passed by the CIT(A) submitted that the gestation period of 3 months as per Section 94(7)(b) of the Act, had expired before the amendment was made by Finance (No. 2) Act, 2004 in respect of the units of mutual fund under consideration except in the case of units of *M/s. Reliance Vision Fund* in which the assessee incurred loss of Rs. 16,53,820/- and the dividend received was Rs. 11,33,530/- that too, before the close of the relevant financial year. Further, it was submitted that the assessee effected the sales of the shares prior to the amendment.

6. The learned Tribunal upon considering the submissions, agreed with the submissions made on behalf of the assessee that mere volume of transactions, transacted by the assessee would not alter the nature of transaction and also agreed with the submission that in the preceding assessment years, the assessee had earned income from long term capital gain and short term capital gain and the department had accepted and assessed the said income as capital gain. Having agreed with the assessee as regards to the afore-mentioned two propositions, the Tribunal, in our considered view, embarked upon a hair-splitting exercise by referring to certain documents in respect of which were filed before it in the form of paper book and pointed out that the short term capital gain in the Assessment Year, 2000-01 was Rs. 11,17,478/- and the short term capital gain in the Assessment Year, 2002-03 was Rs. 8,74,564/- and for the Assessment Year, 2003-04 it was Rs. 9,00,094/- and for the Assessment Year 2004-05 it was Rs. 13,38,560/-, however, in the Assessment Year under consideration (2005-06) the short term capital gain was Rs. 2,52,87,056/-. Further, the Tribunal picked up certain purchase and sale transactions effected by the assessee and held that the period of holding was less than 10 days and, therefore, opined that the frequency with which the assessee purchased and sold shares in the assessment year under consideration has to be considered as relevant factor to ascertain the intention of the assessee as to whether the share transactions entered into by the assessee were in the nature of investment or in the nature of business activity. After referring to a decision of the authority of advance

ruling in the case of **Fidelity Northstar Fund and Ors.**¹, the Tribunal held that the transactions entered into by the assessee for purchase and sale of the shares in the year under consideration, are in the nature of trade and not by way of investment. After noting a few decisions, the Tribunal came to the conclusion that the Assessing Officer has rightly considered that the transactions of purchase and sale of shares by the assessee in the assessment year under consideration are in the nature of dealing in the shares instead of treating them as investment in shares. What had weighed in the mind of the Tribunal is the magnitude of the investment and the frequency with which shares were purchased and sold by the assessee to come to a conclusion that the transaction was not an investment but a business activity. Thus, it was held that the profit of the assessee from share transactions in the assessment year under consideration is business income and not a capital gain. With regard to the plea of consistency which was canvassed by the assessee by placing reliance on the decision of the Hon'ble Supreme Court in **Radhasoami Satsang Versus Commissioner of Income Tax** ², the Tribunal held that the said decision will not apply to the facts of the case and accordingly, the decision given by the CIT(A) was reversed and the order passed by the Assessing Officer was restored.

7. As pointed out earlier, the learned Tribunal had agreed with the submissions of the assessee that the volume of transactions, transacted by the assessee would not alter the nature of transactions. The tribunal also agreed that in the preceding years, the assessee had earned income from

¹ (2007) 288 ITR 641

² 193 ITR 321

long term capital gains and short term capital gains which has been consistently accepted by the department. The assessee had therefore contended that for the assessment year under consideration, the same approach has to be maintained as the principle of consistency has to be applied. To support such contention, the decision in **Radhasoami Satsang** was relied upon. Though the tribunal accepted legal position that volume of transactions is not a determinative factor for the nature of transactions, it was swayed by the facts and figures with regard to the short-term capital gains in the four assessment years. The tribunal was only concerned about the quantum of short-term capital gains which has arisen in the assessment year under consideration. Thus, the tribunal seeks to project the case that the short-term capital gains which was little more than Rs. 13,00,000/- in the assessment year 2004-2005 had risen up to Rs. 2.52 crores in the assessment year under consideration. In order to verify the correctness of the said conclusion, we have perused the schedule annexed to and forming part of the accounts for the year ended 31.03.2005. Schedule 10 therein would be relevant for the purpose of this case which reads as follows:

As On
31.03.2004
Amounts (Rs.)

Schedule 10

Income From Operations

<i>Income from Brokerage</i>	24,367,241
<i>Dividend Received</i>	34,378,769
<i>Income from Mutual Funds (TDS Rs. 3973/- P.Y. 10485/-)</i>	1,671,863
<i>Loss on Sale of Units</i>	(17,892,477)
<i>Profit on Sale of Investment</i>	19,231,037
<i>Profit & Loss on Speculative Transactions</i>	(34,930,501)
<i>Misc. Income (TDS Rs. 58443/-, P.Y. Nil)</i>	-
	26,825,932

8. From the above schedule, it is seen for the assessment year 2004-2005 the amount was Rs. 1,78,92,477/- the profit and loss on speculative transactions was Rs. 1,92,31,037/-. However, these figures were not noted by the tribunal and the case was sought to be projected as if the short-term capital gains had jumped up to Rs. 2.52 crores from Rs. 13,00,000/-.
9. The next aspect which led the tribunal to decide against the assessee is with regard to the holding period of the various shares and stocks. The learned senior counsel had referred to a chart showing details of short-term capital gains/loss on sales of shares with number of transactions and period of holding for the year 2004-2005. From the said chart, we find that the assessee has held the shares in blue chip companies for more than period ranging from 286 to 337 days. In respect of *M/s. I-Flex (Bonus Shares)*, the holding period is 268 days. Only in very few cases, the holding period has been less than 10 days. Thus, the vital statistics appears to have not been noticed by the tribunal more particularly that out of the remaining short term capital gains, gains of Rs. 13,59,532/- were in respect of shares obtained by applying in IPOs or rights issued and gains to the extent of Rs. 96,92,938/- were in respect of shares of four blue chip companies with period of holding ranging from 41 to 158 days. Further from the records placed before this Court, we find that for the assessment year 2000-2001 the assessee had long term capital gains of Rs. 1,46,40,322/- with overall capital gains of Rs. 1,57,57,800/- for the assessment year 2001-2002 long-term capital gains of Rs. 34,65,696/- with overall capital gains of Rs. 42,75,672/- and for the assessment year 2003-2004, the assessee had long

term capital gains of Rs. 31,70,843/- with overall capital gains of Rs. 40,71,537/-.

10. Thus, we are of the view that the learned tribunal had failed to take into consideration the relevant materials based on which the CIT(A) had come to conclusion that the assessee was bona fide investor in shares and has to be allowed to compute the income arising from the purchase and sales of shares to income arising from investment chargeable to tax as income from capital gains.

11. In **Commissioner of Income Tax Versus Merlin Holding Private Limited³**, the Hon'ble Division Bench of this Court held that an investor can have shares transactions with a motive of making investment as well as trading if they are separately shown in books of accounts. It was further held that the volume of transactions can only be an indicative factor but it cannot be a determinative factor in analysing any transactions. The decision in **Merlin Holding Private limited** was followed in **Principal Commissioner of Income Tax, Central-1, Kolkata Versus Purvanchal Leasing Limited⁴** wherein it was held as follows:

“The second submission is with regard to the volume of transaction which, according to the revenue, is to be noted to ascertain the intention of the assessee. It was pointed out by the learned senior counsel for the respondent that only less than 1/3rd of the total transactions was held for a short period. That apart, the volume of transaction cannot have any impact to consider as to whether the

³ (2015) 375 ITR 118 (Cal)

⁴ (2022) 287 Taxman 20/137 taxmann.com 253 (Calcutta)

transaction would give rise to short-term capital gain or not.”

“.....in the case of CIT v. Merlin Holding (P.) Ltd. [2016] 65 taxmann.com 37/[2015] 375 ITR 118 (Cal.). In the said case the Court found that the frequency cannot alone go to show the intention was not to make an investment.”

12. At this juncture, it will be useful to refer to the decision of the Hon’ble Supreme Court in **CIT Versus Associated Development Company Private Limited** ⁵ wherein it was held that the issue regarding the holding of shares is by way of investment or forming part of stocks in trade is a matter within the knowledge of assessee and if produces evidence to show he had maintained the distinction between the shares which are held as stock in trade and which are by way of investment, then the intention of the assessee is a main criteria to be judged.

13. It is an undisputed factual position that the assessee has been keeping the shares in the investment portfolio which has been accepted in all the previous years and some of the shares which have been sold during the assessment year under consideration were treated as short term shares where the opening investment shares from that of the previous year and such shares were accepted in the previous year to be under the investment portfolio of the assessee companies. Further the assessee was able to demonstrate that their net worth was more than Rs. 13 crores and the shares worth more than Rs. 8 crores were shown as closing investment in shares and transactions were in respect of about 20 scripts which were blue chip scripts and if the net worth and the closing investment is considered

⁵ 82 ITR 586 (SC)

the investment of the assessee cannot be said to be voluminous or frequent. That apart, we have also noticed from the chart produced by assessee that the frequency of the transactions is very meagre and the volume of the transaction was within the net worth of the assessee company by utilising their own funds. Further we find that for the assessment year 2004-05, in a scrutiny assessment the assessing officer has treated the investment kept by the assessee in the investment portfolio as an investment in shares and the income thereon was computed under the head of short-term capital gains.

14. Thus, we are of the clear mind that the rules of consistency has to be maintained in the case of the assessee for the assessment year under consideration and the assessee rightly relied upon the decision of the Hon'ble Supreme Court in **Radhasoami Satsang**. Further we find that the order passed by the CIT(A) dated 09.05.2008 was followed for the assessment year 2005-2006 by the Commissioner of Income Tax (Appeals) in his order dated March 24, 2009. For the assessment year 2006-2007 the assessing officer treated the short-term capital gains as the business income. The Commissioner of Income Tax (Appeals) following his order for the assessment year under consideration (A.Y. 2005-2006) held the income to be short term capital gains and not business income. Against such order dated March 24, 2009, the revenue preferred appeal before the learned tribunal in ITA No. 1104/Kol/2009 which was dismissed by the tribunal by order dated August 21, 2009. It is not clear as to whether the learned tribunal while passing the impugned order had taken note of the order passed by the coordinate bench of the tribunal for the assessment year

2006-2007 dated 21.08.2009 though the order impugned before us was passed on 28.10.2009.

15. Thus, for all the above reasons, we are of the clear view that the learned tribunal ought not to have reversed the order passed by the Commissioner of Income Tax (Appeals).

16. In the result, the appeal filed by the assessee is allowed and the substantial question of law is answered in favour of the assessee. No Costs.

(T.S. SIVAGNANAM. J.)

I Agree.

(SUPRATIM BHATTACHARYA, J.)

(P.A.- PRAMITA/SACHIN)