

Form No. (J2)

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

Present :

The Hon'ble JUSTICE T. S. SIVAGNANAM

And

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

ITAT/203/2017
IA NO.GA/2/2017 (Old No.GA/1778/2017)

PRINCIPAL COMMISSIONER OF INCOME TAX CENTRAL-1, KOLKATA
VS
PURVANCHAL LEASING LTD.

Appearance:
Ms. Sucharita Biswas, Adv.
Mr. Soumen Bhattacharjee, Adv.
...for the appellant.

Mr. J.P. Khaitan, Sr. Adv.,
Ms. Swapna Das, Adv.
Mr. Siddhartha Das, Adv.
for the respondent.

Heard on : 21.01.2022

Judgment on : 21.01.2022

T.S. SIVAGNANAM J. : This appeal of the revenue filed under Section 260A of the Income Tax Act (the 'Act' in brevity) is directed against the order dated 19th October, 2016 passed by

the Income Tax Appellate Tribunal, C-Bench, Kolkata (the 'Tribunal') in ITA No.1429/Kol/2013 for the assessment year 2006-07.

The revenue has raised the following substantial questions of law for consideration:

- (i) *Whether on the facts and in the circumstances of the case, the Learned Tribunal erred in law in treating the income from trading in shares as capital gains and not business income without determining whether shares held by the assessee as investment (thereafter giving rise to capital gains) or stock in trade (therefore giving rise to business profit)?*
- (ii) *Whether on the facts and circumstances of the case, the Learned Tribunal erred in law in not appreciating that an under assessment made by the Assessing officer in a particular assessment year cannot be the basis of the principle of consistency for all the following assessment years?*
- (iii) *Whether on the facts and circumstances of the case, the Learned Tribunal erred in law in not appreciating that circular no. 6/16 dated 29/2/2016 is not at all applicable in respect to assessment year 2006-07?*

We have heard Ms. Sucharita Biswas, learned standing counsel assisted by Mr. Soumen Bhattacharjee appearing for the

appellant/revenue and Mr. J.P. Khaitan, learned senior counsel assisted by Ms. Swapna Das, learned counsel and Mr. Siddhartha Das, learned counsel, appearing for the respondent/assessee.

The assessee is a company engaged in the business of investment in shares, mutual funds and debentures for several years. For the assessment year under consideration AY - 2006-07, the assessee filed the return of income on 30th November, 2006 disclosing a total income of Rs.4,91,85,610/-. The assessee declared short-term capital gain on purchase and sale of shares and mutual funds. The assessment was completed under Section 143(3) of the Act by order dated 30th June, 2008 in which the short-term capital gain as declared by the assessee was accepted by the assessing officer. The Commissioner of Income Tax, Central-1, Kolkata (CIT) invoked his power under Section 263 of the Act and passed an order dated 4th March, 2011 holding that the assessing officer did not properly examine the question as to whether the gain on purchase and sale of shares and security had to be assessed under the head of "capital gain" or "income from business". The CIT directed the assessing officer to make a fresh assessment. Pursuant to such direction, the assessing officer examined the question and held that the gain on sale of shares had to be under the head of "income from business".

Aggrieved by such order, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), Central

-1, Kolkata contending that in the past, that is, for the assessment year 2005-2006, similar transactions were considered as giving rise to short-term capital gain and merely because there was large volume and frequency of transactions, it cannot automatically make the transaction as trading in shares. The assessee, therefore, contended that the principle of consistency should be followed as the revenue for the previous assessment year has accepted the similar transactions to give rise to short-term capital gain and cannot take a contrary view in the subsequent assessment year on the same set of facts. The assessee further pointed out that for the assessment year 2007-08 proceedings were initiated by the CIT under Section 263 of the Act and the assessee's case was accepted by the revenue and the proceedings initiated under Section 263 were dropped. Therefore, the assessee contended that the finding rendered by the assessing officer was erroneous. The Tribunal examined the contention and after noting the factual position has granted relief to the assessee. It is contended before us that the volume of transaction was rightly noted by the assessing officer by which the intention of the assessee can be culled out. It was further submitted that for the assessment year under consideration (AY 2006-07), the shares and stocks have been treated as stock in trade and not as an investment as was the case in the assessment year 2005-06 or 2007-08. It was further submitted that the principles of *res judicata* is not

applicable to the provisions of the income tax and in this regard placed reliance on the decision in the case of Commissioner of Wealth Tax -vs- Meatles (P) Ltd. Reported in (1984) 19 Taxman 116 (Delhi).

We have heard Mr. Khaitan on the above submissions. Firstly, we note that the contention of the revenue that the shares and mutual funds that were sold during the year which resulted in the income has been shown as stock in trade and not an investment is a factually incorrect submission. Though the learned standing counsel contended that she has oral instructions to say so the facts are otherwise. On going through the order passed by the Tribunal in paragraph 10 therein we find that the Tribunal has recorded that it has been held as an investment and not as a stock in trade. Similar finding has also been rendered by the CIT. Therefore, the said contention cannot be accepted. 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 transaction would give rise to short-term capital gain or not. This aspect of the matter was rightly dealt with by the Tribunal by taking note of the fact that similar

transactions were accepted by the department for the previous year and the subsequent assessment year as giving rise to capital gain and not as business income. In fact, for the subsequent investment year 2007-08, proceedings initiated under Section 263 were dropped by the CIT on being satisfied with the nature of the transaction. Hence, if the same volume of transactions were not the subject matter of any review by the authorities, a solitary stand cannot be taken for the assessment year under consideration alone. In any event, the volume of transaction cannot have any impact to assess as to whether it would give rise to short-term capital gain especially when the fact is not in dispute that the assessee is engaged in the business of making investment in shares, mutual funds and debentures etc. for several years. Therefore, the second contention raised by the revenue also is not tenable. With regard to the plea of *res judicata* is concerned, the Tribunal rightly noted the law that rule of *res judicata* is not applicable to income tax proceedings but the principle of consistency will definitely apply. In the preceding paragraphs we have set out the facts to show as to how the department has examined the returns filed by the assessee for the previous assessment year and the subsequent year. Therefore, we find that there cannot be different yardstick for the assessment year under consideration when facts and circumstances are identical. Reliance has been placed on the decision in the case

of Meatles (P) Ltd. (supra). The said decision is clearly distinguishable on facts as could be seen from paragraph 5 of the judgment which arose under the Wealth Tax Act, 1957 wherein the department urged that an inadvertent admission was made in the income tax appeal for exclusion of the income from assessment. Therefore, it was held that the Tribunal cannot be prevented from giving an independent finding in the wealth tax appeals. The said decision is wholly inapplicable to the facts and circumstances of the case on hand. The learned senior counsel for the respondent placed reliance on the decision in the case of Commissioner of Income-Tax, Kolkata - III Vs. Merlin Holding (P) Ltd., reported in [2016] 56 taxmann.com 37 (Calcutta) equivalent to [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. Thus, the Tribunal rightly appreciated the legal position and granted relief. The learned senior counsel placed reliance on a circular issued by the CBDT dated 29th February, 2016. This circular having been issued only in the year 2016 obviously cannot be referred to test the correctness of an order of assessment passed for the assessment year 2006-07. For the above reasons, we find that there is no error or perversity in the order passed by the Tribunal.

In the result, the appeal (ITAT/203/2017) fails and is hereby dismissed. Consequently, the substantial questions of law are answered against the revenue.

With the dismissal of the appeal, the stay application (GA/2/2017) stands closed.

(T. S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)

S.Das/_{sp3}