OD-13

ITA/48/2014

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (Income Tax)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX,
CENTRAL-1, KOLKATA

-Versus-

JAQUA INDUSTRIES AND SALES CO.
PVT. LTD.

BEFORE :
THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI
And
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ
Date : 20th December, 2023

Appearance:
Mr. Aryak Dutt, Adv.
...for the appellant

Mr. Anil Kumar Dugar, Adv.
Mr. Rajarshi Chatterjee, Adv.
...for the respondents..

The Court : Heard Mr. Aryak Dutt, learned standing counsel for the appellant and Mr. Anil Kumar Dugar, learned Advocate for the respondent/assessee.

This appeal was admitted by order dated 6th August, 2014 on the following substantial questions of law:

> *"1. Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law in upholding the order of the CIT (Appeal) that the profit arising out of sales of shares were to be treated as Short Term Capital Gains or Long Term*

Capital Gains only instead of treating the same as business income of the assessee ?

2. Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law in not considering that the transaction of the previous as well as succeeding assessment years has no relevance in the context of determining the nature of transaction for a given assessment year so far as the transactions of sales of shares are concerned ?"

We find that the Tribunal has considered the question of long term capital gain and short term capital gain in paragraphs 7 and 8 of its order impugned herein dated 8th January, 2014, which are reproduced below:

"*7. We have heard the rival submissions and perused the orders of authorities below. Share capital with reserve and surplus of the assessee as on 31.03.2008 stood at Rs.21,04,76,870.38 vide audited balance-sheet at page 12 of the paper book. Against this, its investment came to Rs.2,11,58,090.47, whereas loans and advances were to the tune of Rs.17,08,87,261.89. As on 31.03.2007 these figures were Rs.11,13,06,258.79, Rs.2,55,62,816.36 and Rs.7,91,88,116.40 respectively. What is clear from the above is that the loans and advances which stood at Rs.7,91,88,116.40 as on 31.03.2007 increased to Rs. 17,08,87,261.89 by the end of the year. As against this, it's investment of Rs.2,55,62,816.36 had come down to Rs. 2,11,58,090.47. Viewed from any angle, loans and advances given by the assessee-company were substantially higher than its investments. We can* *therefore safely say that assessee was more engaged in the business of giving loans and advances. Memorandum of Association of the Company placed at pages 41-53 of the paper book shows that its main object was manufacturing and dealing in plastic and synthetic raw materials as also manufacturing and fabrication of rubber and rubber products. During the relevant previous year, assessee had not done any transactions of this nature. By virtue of its ancillary object which say that it can invest and deal with surplus money not immediately required from time to time as determined by its Directors, it could have invested its surplus in shares and also given-loans and advances. As per the audited balance-sheet as on 31.03.2007, a copy of which is placed at page 7 of the paper book, assessee did not hold any shares as stock in trade. It held it's shares under investment portfolio only.*

8. Now coming to the shares purchased anti sold by the assessee during the relevant previous year, list thereof has been reproduced by the Assessing Officer at pages 7 & 8 of his order. Except for 2000 shares in NMDC Ltd., 95,699 in Nicco Corporation Limited and 100 shares in Cipla Limited, totalling to 97,799, all other shares out of total 11,26,720 purchased and sold were that of M/s. Kalpana Industries Ltd. In other words 91.33% of the total shares purchased were of M/s. Kalpana Industries. There is no dispute that M/s. Kalpana Industries Ltd. was a group company of the assessee. Thus major part of the shares held was of a group company. Assessee was consistently showing *this as an investment. Neither in the preceding previous year nor in the succeeding previous year assessee had indulged in an activity resulting in a surplus or loss on sale of shares. Audited Profit & Loss A/c. of the assessee as year ended 31.03.2009 placed at page 31 of the paper book showed that there was no income whatsoever from sale of shares either under the head "income from capital gains" or otherwise. Similarly, the audited profit and loss a/c. for the year as on 31.3.2007 placed at paper book page no. 6, clearly show that it had no income from sale of shares. Thus in our opinion, Assessing Officer went off tangent in considering the transactions of the impugned assessment year in an isolated fashion, ignoring the results for the immediately preceding year as well as the succeeding year. In our opinion assessee was able to demonstrate its intention of holding the shares as investment. Once such intention is demonstrated the sale would result in capital gains and not business income. No doubt, Hon'ble jurisdictional High Court in the case of Sree Krishna Properties Ltd. (supra) had held that description of shares as stock-in-trade in the balance-sheet was not decisive. However, here not only description but the intention to hold the shares as investment, was clear from the activities undertaken by the assessee in the preceding as well as succeeding period. We are, therefore, of the opinion that Ld. CIT(Appeals) was justified in holding the surplus arising out of sale of shares as capital gains. We do not find any reason to interfere with the order*

> *of Ld. CIT (Appeals). Ground No. 1 of Revenue stands dismissed."*

It could not be disputed by learned counsel for the appellant that the main object of the respondent assessee is manufacturing and dealing in plastic and synthetic raw material as also manufacture and fabrication of rubber and rubber products. It's ancillary object is investment and dealing with surplus money not immediately required from time to time as determined by its directors. The Tribunal has found, as a matter of fact and based on evidence, that in the earlier and subsequent assessment years, the respondent/assessee had not indulged in activity resulting in a surplus or loss on sale of shares. It is only during the assessment year 2008-09 i.e. the assessment year in question that the assessee had sold shares which resulted in some long term capital gain and some short term capital gain. The audited balance-sheet of the respondent/assessee also demonstrates intention of the assessee that he was holding the shares as investment. The findings recorded by the Tribunal with respect to the holding of shares by the respondent/assessee as investment and sale thereof resulting in long term capital gain or short term capital gain, are findings of fact based on consideration of relevant evidence on record. The findings of the Tribunal does not suffer from any perversity.

For all the reasons aforestated, we do not find any merit in this appeal. Consequently, the substantial questions of law as reproduced above, are answered against the revenue and in favour of the assessee.

The appeal (ITA/48/2014) is dismissed.

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)

As.