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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 712/2018

PR. COMMISSIONER OF INCOME TAX, DELHI-18
..... Appellant

Through: Mr. Sunil Agarwala, SSC with Mr. Shivansh Pandya, Mr. Utkarsh Tiwari, Mr. Amaan Ahmed Khan, Advs.

versus

M/S SHRIHARI INVESTMENT
..... Respondent

Through: Mr. Satyen Sethi, Mr. Arta Trana Panda, Advs.

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\+ ITA 713/2018

PR. COMMISSIONER OF INCOME TAX, DELHI-18
..... Appellant

Through: Mr. Sunil Agarwala, SSC with Mr. Shivansh Pandya, Mr. Utkarsh Tiwari, Mr. Amaan Ahmed Khan, Advs.

versus

M/S SHRIHARI INVESTMENT
..... Respondent

Through: Mr. Satyen Sethi, Mr. Arta Trana Panda, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

ORDER

% **27.02.2024**

1. The appellant impugns the order dated 02 January 2018 passed

by the Income Tax Appellate Tribunal ["**ITAT**"] and proposes the following questions of law for our consideration:-

> "A. Whether the ITAT was justified in deleting the addition on account of business income from trading in shares made by the assessing officer without considering the findings recorded by the assessing officer having a direct bearing on the issue and arriving at an assumption which is not supported by any evidence or material on record?
>
> B. Whether the ITAT was legally justified in holding that income from trading in shares was not in the nature of business income by ignoring the comments of the tax auditor in Form 3CD that the assesse was engaged in the business of trading in shares and securities and a fact that the assessee is engaged in earning income from trading in shares in different assessment years?
>
> C. Whether the ITAT is legally justified in deleting the addition on account of business income from trading in share by the assessing officer without considering the well-settled principles upheld by the Hon'ble Supreme Court of India in cases of CIT v. Associated Industrial Development (P) Ltd. (82 ITR 586), CIT v. H. Holck Larsen (160 ITR 67) and G. Venkataswami Naidu & Co. v. CIT (35 ITR 594) as well as CBDT Circular No.4 of2007?"

2. A reading of the impugned order indicates that the ITAT has essentially followed the view taken by it in respect of Assessment Year ["**AY**"] 2008-2009. Undisputedly, the appellant has not questioned the judgment rendered by the ITAT for the aforenoted AY. Pursuant to the earlier orders passed, a compliance affidavit has been also filed seeking to explain the reasons which weighed with the appellant in not assailing the view as expressed by the ITAT.

3. Notwithstanding the above, we note that while dealing with the question of whether the income earned from the sale of securities was liable to be treated as business income or capital gains, the ITAT in AY 2008-2009 has essentially affirmed the view expressed by the Commissioner of Income Tax(Appeals) ["**CIT(A)**"] who had on a due consideration of the facts as placed before it observed as follows:-

"6.8 I find force a merit in the arguments put forth by the appellant for the reasons given below:

a) The balance sheet filed before the Assessing Officer in the course of assessment proceedings as well as the undersigned in the course of the appellate proceedings showed the investments at Rs-42, 19,89,569/- as on 31.3.2007.

b) It was categorically stated by the AR that during the A.Y. 2007-o8, the appellant had two portfolios, one an investment portfolio and another trading portfolio. The appellant in this year traded in shares as trading activity and hence no stock was carried forward.

c) During the assessment year 2008-09 the appellant has not traded in shares as there was no stock and only sold investments out of the investment portfolio.

d) To substantiate the above transactions, the AR of the appellant filed details of shares in the investment portfolio where the investments were held for more than 12 months and also for less than 12 months.

Therefore, the computation of capital gains therefrom was accordingly shown in the statement of income as 'long term capital gains' and 'short term capital gains'. In this regard I place reliance on the judgment of the Hon'ble Delhi High Court in the case of CIT vs. Rohit Anand reported in 327 ITR 445 where it was held as under:

16. In the facts and circumstances of the case as narrated hereinabove, viewing the matter in totality no inference other than one that the assessee has earned capital gains in its Investment Portfolio as declared by it in the computation of income can be drawn.

17. Assessing Officer's allegation that the entire activities of the Company is a colourable device, is without any basis as in any case the applicable tax rates to partnership firm and to the partners who are corporate entities is one and the same.

18. Reliance of the Assessing Officer on Me Dowell & Co. vs. CTO (supra) is of no relevance in view of the decision of the Supreme Court in Union of India vs. Azadi Bachao Andolan & Others (2003) 263 ITR 706 (SC), wherein· the court held that an act, which is otherwise valid in law, cannot be treated as non-est, merely on the basis of some underlying motive supposedly resulting in some economic detriment or prejudice to the national interest as per perception of the revenue. When the principles laid down in this case are applied to the facts of the present case, where

capital is contributed by its partners in the form of shares and securities which were held by the firm for a period of more than twelve months after holding the same in Investment Portfolio and realized thereafter it has to be treated on Investment account resulting in capital gains rather than business income. This position has since been reiterated by the Supreme Court in CIT vs. Wallfort Share & Stock Brokers (P) Ltd. (2010) 326ITR 1 (SC)."

6.9 After analyzing the issue and considering the judgments of various courts, and also on the basis of evidence filed by the appellant I find the intention of the appellant is to hold the investment for a certain period and to reap the profits at an appropriate time. It is also seen that the Assessing Officer has not brought sufficient evidence to prove that the activity of the appellant should be treated as business income. A prudent investor always keeps a watch on the market trends and there is no bar under law from liquidating the investment in shares.

The law itself has recognized this fact by taxing these transactions under the head capital gains. Section 111A stipulates that scripts and mutual funds that suffer securities transactions tax and held for 12 months are to be treated as short term capital gains. An intention is an anticipated outcome that is guided through a process and a purpose to obtain an end result. In the case of the appellant, such intention to make quick and high profits were not clearly brought out by the Assessing Officer.

In view of the above discussion the transactions under taken by the appellant were found to be correct. Therefore, the Assessing Officer is directed to re-compute the income of the appellant treating the same under capital gains only and not under business income."

4. On a due consideration of the view as expressed by the CIT(A), the ITAT, while disposing of the appeal for AY 2008-2009, had held as follows:-

"6. For assessment year 2010 - 11 partnership carried out investment activities. From the balance sheet and profit and loss account of the firm, It was seen that at the beginning of the year relevant to a Y 2010 – 11 assessee had investment in shares and securities of Rs. 6 3558 3427 and at the close of the year it has investment of Rs. 885609456. During the year the assessee acquired fresh investment of Rs. 8 5871 2486 and realised the investment of Rs. 7 2848 8592/-. On sale of this investment assessee earned gain of Rs. 11 98 02135/- and shown as long term and short term capital gains. In the computation of income filed along with the return of income assessee declared long-term capital gain of Rs. 112262709/- and claimed exemption under section 10 (38) paying security transaction tax and also disclosed long term capital loss of Rs. 159123/-. It also disclosed short-term capital gain of Rs. 1 271939 which was chargeable to tax at the rate of 15% and short-term capital gain of Rs. 6 4 to 6610/- taxable at the rate of 30%. The partners contributed many of the stocks and shares as capital contribution in the firm.

7. For assessment year 2010 - 11, Assessee filed return on 28/7/2010 showing income of Rs. 7 863720/- with current year loss of Rs. 1 59123/-. As during the year the assessee has earned profit on sale of investment amounting to Rs. 119802135/- and dividend of Rs. 1 348 2870/- and the income of Rs. 173081/-. The Ld. Assessing officer sought the details of business activities of the assessee. Assessee replied on 8/11/2012 holding that income earned by the assessee is chargeable to tax under the head long-term capital gain and short term capital gain. It was further stated that the taxable income of Rs. 164789/- had been shown as income from speculative transaction and same is assessable as business income. The main contention of the assessee was that the appellant partnership firm was constituted mainly with the object of investment for long-term appreciation in sales and securities. It was further stated that during the assessment year 2010 -11 assessee did not deal in shares and securities and it had only one portfolio that was investment portfolio and the all the shares were held by it in that portfolio. It further relied on several judgments wherein such kind of activity was held to be investment activities.

8. The Ld. assessing officer held that in the present case the assessee firm has used a colourable device to avoid tax or paid tax at lower rate by claiming exemption under section 10 (38) for short-term capital gain at lower tax - rates. Further whatever is the amount earned by the partnership firm if distributed to the partners would also be tax-free in their hands. Therefore, he stated that there is no explanation by the assessee that if the Firm. is not doing are engaged in the business, then the question arises as to why and what for the Firm was constituted. According to him in the present case 8 partners have come together to put their fund in a collective manner for its better utilisation which is nothing else but business or adventure. He further held that the transactions mentioned by the assessee shows that the assessee has sold securities for value of Rs. 7 1744 2884/as cost of which were Rs. 5 976407 for 8/- and the number of shares alone sold during the year are 243 8663. Therefore according to him the volume of the transaction made by the its assessee during the year itself shows that it is engaged in the business of securities. He further held that if the partners in the form of a company show the profits, then they are liable to pay minimum alternate tax under section 115 JB of the income tax act

and therefore the assessee has used the colourable device and avoided the payment of tax to the tune of Rs. 3.40 crores. He further stated that as all the 8 partners are the private limited companies and based on the details of addition and withdrawal of capital by the partners it is proved that these shares were actually held by the partner companies in their names who has made the investment but were shown in the hands of the firm. I making corresponding book entry in their capital account. He further held that though the partnership was reconstituted however, certain earlier partners controlling the partner companies through majority of shareholding. Hence, he stated that partnership firm is been created as a colourable device for evasion of tax. He further held that as the main business object of the assessee firm was that to carry on the business of dealing in shares and security, statement of purchase and sale of shares also shows the activity of the assessee and prove that it is engaged in the business of purchase and sale of securities in an organised and regular manner and showing income therefrom under a different head is just a strategy to avoid taxation. Hence, he held that assessee is engaged in the business. Further, he stated that looking to the volume, frequency of the transaction and also the quantum of investment and the admitted intention of the assessee confirmed that the income earned by it on purchase and sale of securities are not income from investment. He after relying on the several decisions and held that main motive of purchasing and selling of the shares and security is too on profit and claiming benefit of exemption or taxation at a lower rate by sewing the same income under the· head capital gains. He further held that during the year assessee had sold 243 8663 shares in addition to more than one crore unit of mutual funds and value off fresh purchase of securities during the year's Rs. 85.87 crores. He therefore held that the transactions are entered into continuously and regularly in an organised manner. Consequently, he assessed the total income earned by the assessee from speculative transaction of the securities, profit on sale of securities shown as short-term capital gain taxable· at the rate of 15%, profit on sale of securities shown as short-term capital gain and taxable at the rate of 30%, profit on sale of securities claimed exempt under section 10 (38) and loss on sale of securities shown as long term capital loss amounting in all to Rs. 119966924/- as income from business. Consequently, assessment order under section 143 (3 of the act was passed on 6/2/2.013 determining the total taxable income of the assessee at Rs. 119967308/-."

5. On due consideration of the aforesaid, we find no justification to interfere with the views as expressed. The appeals, in any case, do not raise any substantial question of law. They shall consequently

stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

FEBRUARY 27, 2024/neha