

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G' NEW DELHI**

**BEFORE
SHRI N.K.SAINI, HON'BLE VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.6064Del/2014
Assessment Year: 2010-11**

ACIT Circle-31(1) New Delhi Appellant	Vs.	Shri Finance 4, Scindia House New Delhi PAN : AACFS9120K Respondent
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**Revenue by : Shri K. Tiwari, Sr. DR
Assessee by : Shri U.N.Marwah, CA**

**Date of hearing : 25.07.2018
Date of pronouncement : 23.10.2018**

ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER :

This appeal has been preferred by the department against order dated 14.08.2014 passed by the Ld. Commissioner of Income Tax (Appeals) -XXVI, New Delhi for assessment year 2010-11 and the sole issue in dispute is whether the gain of Rs. 2,14,75,356/- from the sale of shares was to be assessed under capital gains or under business income .

2.0 Brief facts of the case are that the assessee is a partnership firm and derives income from investment activities. The return of

income was filed declaring income of Rs. 19,96,804/- which included Short Term Capital Gains of Rs. 19,22,796/- and interest of Rs. 74,008/-. The Short Term Capital Gains were arrived at after claiming set off of brought forward short term capital loss of Rs. 19,53,229/- pertaining to assessment year 2007-08. The assessee had also claimed income of Rs. 1,75,54,960/- exempt under section 10(38) of the Income Tax Act, 1961 (herein after called as 'the Act') and dividend income of Rs. 26,36,252/- claimed as exempt u/s 10(34)/(35) of the Act. The Assessee also claimed carry forward of long term capital loss amounting to Rs. 41,247/-. The case was selected for scrutiny and during the course of scrutiny assessment proceedings, the AO formed the opinion that the share transactions entered into by the assessee were in the nature of business operations and not in the nature of investment as claimed by the assessee. Accordingly, the AO proceeded to assess the gains derived from the share trading as 'business income' as against 'capital gains' as claimed by the assessee. The assessment was completed at an income of Rs. 2,15,49,360/- wherein the long term capital gain of Rs. 1,75,54,960/- claimed as exempt u/s 10(38) and short term capital gains of Rs. 19,22,796/- were assessed as business

income. The consequential effect was that the set off of short term capital loss of Rs. 19,53,229/- was also not allowed.

2.1 Aggrieved, the assessee approached the Ld. CIT (A) challenging the treatment of capital gains as business income. The Ld. CIT (A) directed the AO to assess the gains of Rs. 2,14,75,356/- from sale of shares under the head 'capital gain' instead of 'business income' and thus allowed relief to the assessee.

2.2 Now the department is before the ITAT and has challenged the order of the Ld. CIT (A) by raising the following grounds of appeal:-

- (i) The Ld. CIT (A) has erred in directing the AO to assess profit of Rs. 2,14,75,356/- from sale of shares under the head Capital Gain instead of Business Income despite the fact that the assessee was engaged in the business of trading in shares and it was the sole activity of the assessee which is also an admitted object of assessee firm as per Partnership Deed.*
- (ii) The CIT (A) has erred in not correctly appreciating the facts of the case that the statement of purchase and sale and also activity of the assessee proved that he was engaged in the business of purchase and sale of securities in an organized and regular manner and showing income therefrom under the different head is just a strategy to avoid tax.*
- (iii) The CIT(A) has not appreciated that the turnover of the assessee was Rs. 27.5 crores and in the light of guidelines provided by CBDT Circular No. 4/2007 dated 15.06.2007, the substantial nature of*

transactions entered into by the assessee can be classified as business activity only.”

3.0 The Ld. Sr. Departmental Representative submitted that the assessee firm had used a colourable device to avoid tax or pay tax at a lower rate by claiming business income as income from capital gains. It was submitted that the assessee firm consisted of six partners who had come together to put their funds in a collective manner for better utilisation and, therefore, the activity was purely of business and not of investment. He referred to the objects, as mentioned in the partnership deed, and submitted that even the objects of the partnership firm mentioned that the object of the firm was to carry on business of funding and investments and, therefore, it was very much clear that the partnership had been constituted to carry on business. The Ld. Sr. Departmental Representative also submitted that the transactions were huge and, therefore, it was evident that the nature of activity was in the nature of business and not investment. The Ld. Sr. Departmental Representative also placed reliance on the following judicial precedence in support of his contention that the nature of activity of the assessee firm was in fact in the nature of business activity --:

1. Manoj Kumar Samdaria Vs. CIT [2014] 45 taxmann.com 394 (Delhi) / [2014] 223 Taxman 245 (Delhi)(MAG)
2. Manoj Kumar Samdaria Vs. CIT [2014] 52 taxmann.com 247 (SC) / [2015] 228 Taxman 63 (SC)
3. Sadhana Nabera vs. ACIT (ITA No. 2586/Mum/2009)
4. CIT Vs. Gopal Purohit ([2010] 188 Taxman 140 (Bombay)/[2011] 336 ITR 287 (Bombay)/[2010] 228 CTR 582 (Bombay)
5. Dalhousie Investment Trust Co. Ltd. Vs. CIT [1968] 68 ITR 486 (SC)

4.0 In response, the Ld. Authorised Representative submitted that presence of commercial motive is a primary legal requirement for trade whereas in the case of the assessee the period of holding of the investments and earning of substantial dividend income substantiate the assessee's claim that the shares were not acquired with the intention of trading but were held for investment purposes. It was submitted that the holdings shares which were sold during the year under consideration were held by the assessee firm between a period of one year to five years and, therefore, it could not be said that the activity was in the nature of business or trade. It was also submitted that the assessee firm has been maintaining two portfolios viz. 'investment' and 'trade' and this has been accepted by the

department since assessment year 2002-03 onwards. It was also submitted that during the year under consideration or in earlier years, the portfolios of the shares have not been inter-changed. It was further submitted that once the segregation of shares under two different portfolios has been made and accepted, the mere quantum of turnover and frequency of the transactions will not decide the nature of transactions. Reliance was placed on the judgment of the Hon'ble Apex Court in the case of Pr. Commissioner of Income Tax vs. Bhanuprasad D. Trivedi (HUF) reported in (2018) 95 taxmann.com (SC) wherein the Hon'ble Apex Court had dismissed the department's Special Leave Petition against the order of the Hon'ble High Court wherein the Hon'ble High Court, by the impugned order, had held that the intention of the assessee at the time of purchase of shares is paramount and where the assessee had clear intention of being an investor and had held shares by way of investment, the assessee was to be treated as investor and any gain arising out of transfer of shares was to be treated as 'capital gains' and not 'business income'. The Ld. Authorised Representative also placed reliance on CBDT Circular no. 6 dated 29.02.2016 wherein it has been stated in Para 3(b) that where in respect of listed shares and

securities held for a period of more than 12 months immediately preceding the date of transfer, the assessee desires to treat the income arising from the transfer thereof as capital gain, the same shall not be put to dispute by the Assessing Officer. The Ld. Authorised Representative also supported the order of the Ld. CIT (A) and submitted that department's appeal deserved to be dismissed.

5.0 We have heard the rival submissions and have also perused the material available on record. It is undisputed that 7 scrips under 10 separate transactions were sold which had holding periods ranging between 370 days to 1738 days. Thus, all the scrips were held for more than 1 year and up to approximately 5 years. It is also undisputed that the shares sold by the assessee and treated as long term capital gains were duly disclosed in the assessee's balance sheet under the head 'investment'. Apart from this, the assessee also undertook 20 transactions of purchase and 13 transactions of sale of shares which have been duly disclosed under Short Term Capital Gains taxable at the normal tax rate of 30%. It is also not established by the department that the assessee has made repetitive transactions of purchase and sales of shares. It is also undisputed that the assessee has

earned substantial dividend income by holding investments and the dividend income during the year amounted to Rs. 26,36,252/-. It is also to be noted that the assessee's two portfolios have been accepted by the department since assessment year 2002-03. The Ld. CIT (A) has given due credence to all these facts and the Ld. Sr. Departmental Representative has not been able to point out any factual error in the findings so recorded by the Ld. CIT (A). We also note that the judicial precedents relied upon by the Ld. Sr. Departmental Representative are distinguishable on facts. It is our considered opinion that on the facts of the case, the adjudication by the Ld. CIT (A) cannot be interfered with. We find support from the judgment of the Hon'ble Delhi High Court in the case of CIT vs. Vinay Mittal reported in (2012) 22 taxman.com 151 (Delhi) wherein the Hon'ble Delhi High Court had dismissed the department's appeal against the order of the Tribunal on an identical issue after duly noting that in the earlier assessment years transactions in the investment portfolio by the assessee were accepted by the Assessing Officer. While dismissing the department's appeal, the Hon'ble Delhi High Court also duly noted the fact that the assessee had been maintaining two

separate portfolios viz. investment portfolio and trading portfolio. The Hon'ble Delhi High Court also observed that the quantum or total number of transactions may not be determinative but in a given case, keeping in view the period of holding may indicate intention to make investment. We also find that CBDT Circular no. 6 dated 29.02.2016 also comes to the aid of the assessee wherein it has been clarified by the CBDT that where the assessee treats the securities as investment and not as stock-in-trade in earlier years, the revenue is not permitted a contrary view. It is evident from this Circular that CBDT has given instructions to the Assessing Officers to treat capital gains on listed shares and securities held for a period of more than 12 months as income from capital gains if the assessee so desires. The dismissal of the Special Leave Petition of the department by the Hon'ble Apex Court in the case of Pr. Commissioner of Income Tax vs. Bhanuprasad D. Trivedy (HUF) (SC) also comes to the aid of the assessee wherein the Hon'ble Apex Court upheld the Hon'ble High Court's impugned order that intention of the assessee at the time of purchase of shares is paramount. Accordingly, in view of our above observations, we find no reason

to interfere with the findings of the Ld. CIT (A) from this issue and we dismiss the grounds raised by the department.

6. In the final result, the appeal of the department stands dismissed.

Order pronounced in the open court on 23rd October, 2018.

**Sd/-
(N.K.SAINI)
VICE PRESIDENT**

**Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER**

BR

Dated: 23rd October, 2018

Copy forwarded to: -

- 1) Appellant
- 2) Respondent
- 3) CIT(A)
- 4) CIT
- 5) DR

True Copy

By Order

ASSTT. REGISTRAR

Date of dictation	22.10.2018
Date on which the typed draft is placed before the dictating Member	23.10.2018
Date on which the typed draft is placed before the Other Member	23.10.2018
Date on which the approved draft comes to the Sr. PS/PS	23.10.2018
Date on which the fair order is placed before the Dictating Member for pronouncement	23.10.2018
Date on which the fair order comes back to the Sr. PS/PS	.10.2018
Date on which the final order is uploaded on the website of ITAT	.10.2018
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	