

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
& SHRI MAHAVIR PRASAD, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 1946/Ahd/2016
(निर्धारण वर्ष / Assessment Year : 2013-14)

Deputy Commissioner of Income Tax Circle- 3(3), Ahmedabad	बनाम/ Vs.	Shri Vijay Aasumal Keshwani 304, Ambience Tower, Nr. Judges Bungalows, Bodakdev, Ahmedabad 380054
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ADGPK5207Q		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Appellant by :	Shri S. K. Dev, Sr. D.R.
प्रत्यर्थी की ओर से / Respondent by :	Shri G. C. Pipara, A.R.

सुनवाई की तारीख / Date of Hearing	01/11/2018
घोषणा की तारीख /Date of Pronouncement	29/01/2019

आदेश/ORDER

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the Revenue against the order of the Commissioner of Income Tax (Appeals)-3, Ahmedabad ('CIT(A)' in short), dated 23.05.2016 arising in the assessment order dated 29.02.2016 passed by the Assessing Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning assessment year 2013-14.

2. As per its ground of appeal, the Revenue has impugned the action of the CIT(A) in accepting profits of Rs.1,75,77,642/- arising on sale of shares to be 'short term capital gain' as claimed by the assessee instead of 'business income' as held by the AO.

3. Briefly stated, the assessee, an individual, filed his return of income for AY 2013-14 declaring total income at Rs.1,90,32,360/-. The case was subjected to scrutiny assessment. In the course of the scrutiny assessment, the AO *inter alia* noticed that the assessee has declared profits arising on purchase and sale of certain shares and securities amounting to Rs.1,75,77,642/- under the head 'capital gains' as 'short term capital gains'. The AO made certain inquiries under s.133(6) of the Act with the concerned broker namely Amrapali Capital & Finance Services Ltd. and found that the shares towards purchases on behalf of the Assessee were lying in the pool account (common accounts of all clients) of the broker pending delivery to the account of the assessee. The shares were meanwhile sold and the delivery thereof was given on behalf of the assessee out of clients pool account. The Contract Note and the ledger account were also verified. The AO observed that high volume and regular frequency of transactions would clearly suggest that the assessee was indulging in a regular and a systematic activity of purchase and sale of shares which tantamounts to business activity. The AO further observed that the assessee has not actually made any worthwhile payments to the broker against the purchase made. The shares lying in the pool account were ultimately sold and the payments obligations were actually met against the sale proceeds of the shares held in the pool account. Consequently, the assessee primarily received the differential amount of profits to its credits without incurring or making payment to the brokers against the purchases made. The AO thus observed that the assessee has neither taken delivery nor made payment towards

purchases of shares. The shares were found to be held for a very brief period in the pool account and resold in the market. The gain arising from which is in the nature of business activity. The AO also observed that the purchase value of the shares is substantial and huge coupled with continuity, frequency and magnitude of transactions involved. The AO thus discarded the claim of the assessee that the object of the purchases made in the shares were capital accretion and to enjoy the yield in the form of dividend and thus the shares were held before the sale as 'capital asset' and not as 'trading asset'. The AO concluded that the assessee has undertaken the transactions of buying and selling of shares with a profit motive at a regular interval and the buying and selling activities were substantial and numerous. In the totality of circumstances, the AO held that the profits arising on purchase and sale of shares are in the nature of 'business income' and therefore denied concessional tax treatment available to the assessee where the gains arising are found to be from investment activity of sale of capital assets.

4. Aggrieved, the assessee preferred appeal before the CIT(A) challenging the action of the AO in treating the short term capital gains of Rs.1,75,77,642/- declared as short term capital gain to be business income in the hands of the assessee. The CIT(A) revisited the facts and submissions made on behalf of the assessee in this regard and found force in the plea of the assessee that the assessee has rightfully claimed the profits arising on purchase and sale of shares as capital gains and set aside the action of the AO holding the same to be 'business income'. The relevant operative paras of the order of the CIT(A) read as under:

“2.6 **Decision :**

The only controversy involved in the present appeal is Short Term Capital Gain on certain transactions of purchases and sales of shares

which has been offered to tax by the appellant @ 15% which has been considered by the A.O. as business income and taxed the same @ 30%. At the outset, the entire transactions of purchases and sales have been considered by the A.O. as genuine and there is no finding that such transactions are bogus or not supported by any documentary evidences. For considering the said transactions as short term capital gain, heavy reliance has been placed by the appellant on Circular No. 4/2007 dated 15th June 2007 issued by the CBDT and submitting that as per the parameters laid down by the various judicial authorities the transactions relating to the present sale and purchases of shares fall within the investment activity and not business activity. A similar submission was also made before the A.O. and in the entire assessment order; A.O. has not recorded any finding as to the Circular dated 15th June 2007 but mainly on the ground that certain shares were found to be in the pool account of the share broker, on the basis of inquiry conducted u/s, 133(6) with the broker and therefore, held that assessee has not taken delivery of the shares. The contention raised by the A.O. is not found to be correct as M/s. Amrapali Capital and Finance Services Ltd. in the Client Report in the name of the appellant for the period 1/4/2012 to 31/3/2013 as placed on page No. 321 & 322 of the Paper Book, deals with purchase and sales of shares giving purchase quantity and rate, sale quantity and rate, has been confirmed to the A.O. Further, A.O. has also observed on page No. 9, while dealing with delivery of the shares that the shares were placed in the pool account and in the reply dated 15th February, 2016 in point No. 8.1 as reproduced by the A.O. on page No. 2 of the assessment order, it is very clear that appellant has confirmed that the shares have been purchased and delivery of the same has also been taken on the same day as being reflected in the pool account of the broker and not in the demat account of the appellant. In the entire assessment order, A.O. has not brought on record any evidence doubting the shares kept in pool account and further u/s. 133(6) as referred in para No. 5 of the assessment order, Amrapali Capital and Finance Services Ltd. has furnished copy of the ledger account and demat account. Therefore, the conclusion arrived by the A.O, that not taking the delivery of the shares in the assessee's own demat account is with the intention to earn profit from sale of shares in a short span of time resulting into an adventure of business is incorrect as from the details of gain it is absolutely clear that there are 26 scripts in which the sales and purchases has been made and there are 35 transactions of purchases and 30 transactions of sales for short term as well as long term gain, during the year under consideration as per the details placed on page No.15 of the Paper Book and as submitted to the A.O., out of which the transactions pertaining to short term capital gains are in respect of 12 scripts, purchase transactions are 18 and sales transactions are 16. The major short term gain is of Rs.1,92,25,180 relating to the 3 transactions of purchase of shares of Onelife Capital and 2 sales transactions. The purchases were in the months of July, September & October, 2012 whereas sales were in the month of July and October, 2012. Since there is a very nominal gap between the date of purchases and sales, the discrepancy with respect to payment date is in the normal course of business as there are other transactions also with the same broker. It is seen that during the course of assessment proceedings as well as appellate proceedings appellant furnished following evidences:

- (i) *Copy of bills for the purchase and sale of shares during FY 2011-12*
- (ii) *Copy of Account of broker namely Amrapali Capital and Finance Service Ltd.*
- (iii) *Copy of D-mat account of the appellant for the period 1-4-2011 to 31-3-2012*
- (iv) *Copy of Pool Account of the broker wherein the name of the appellant is appearing as beneficiary of the shares held in pool account of the broker*
- (v) *Copy of personal accounts, wherein the shares have been shown as investment.*

It is also seen that such shares has been shown as investment in the balance sheet in the earlier years as well as in this year and there are no borrowed funds. Therefore, all the criteria relating to investment activity are fulfilled. Moreover, the A.O. has considered the transactions as genuine but only considered the same as business income as adventure in nature of trade. Reliance is also placed on the judgment of Hon'ble Gujarat High Court in the case of CIT Vs. Niraj Amidhar Surti, 238 CTR 294 wherein it has been held as under:

"12. On a perusal of the assessment order, It appears that the main consideration which has weighed upon the Assessing Officer for the purpose of holding that the transaction in question is an "adventure in the nature of trade" and not an investment, is that for the purpose of purchasing the shares in question, namely, the shares of Euro Asian Securities Ltd. (Home Trade Ltd.), the assessee had obtained loan from M/s Maniram Consultants & Investments Pvt, Ltd. on interest at the rate of 30%, which according to the Assessing Officer, was an exorbitant rate. Though the assessee had purchased/sold other shares and units of mutual funds, this solitary transaction had been disputed by the Assessing Officer mainly because the assessee had purchased the shares in question from borrowed funds obtained on high rate of interest, which also forms the basis for the conclusion arrived at by the Assessing Officer that the transaction in question is an "adventure in the nature of trade or business rather than a normal investment.

13. Another reason for holding that the transaction in question is an "adventure in the nature of trade or business" is that the shares in question were held by Maniram Consultants till the entire loan was paid and were initially purchased in the name of Maniram Consultants in terms of the agreement between the assessee and Man/ram Consultants. According to the Assessing Officer, since the assessee had not obtained physical possession of the shares in question at the relevant time, the assessee was not the owner of the shares in question.

14. However, the reasoning adopted by the Assessing Officer loses sight of the fact that merely because the shares had been purchased from borrowed funds obtained on high rate of interest would not change the nature of the transaction from investment to one in the nature of an "adventure in the nature of trade".

15. *The apex court in the case of **Khan Bahadur Ahmed Alladin & Sons v. Commissioner of Income Tax, Andhra Pradesh** (supra) has held that the question as to whether the transaction is an adventure in the nature of trade must be decided on a consideration of a/I the relevant facts and circumstances which are proved in a particular case. The answer to the question does not depend upon the application of any abstract rule, principle or formula but must depend upon the total impression effect of all the relevant facts and circumstances established in the particular case.*

16. *In the case of the **Commissioner of Income Tax, Nagpur v. M/s Sutlej Cotton Mills Supply Agency Ltd.**, (1975) 100 ITR 706, the Supreme Court has held that a capital investment and resale do not lose their capital nature merely because the resale was foreseen and contemplated when the investment was made and the possibility of enhanced values motivated the investment.*

*The appellant has also relied upon another decision of **Hon'ble ITAT, Mumbai** in the case of **ITO Vs. Deepchan G. Shah (2011) 128 ITD 488**, wherein, the ITAT had an occasion to deal with the issue relating to the shares held in pool account and held that the shares held in the pool account of the broker is to be considered for the purpose of determining the period of holding of the shares. Therefore, it is a common practice to have the shares in the pool account of the broker and it is not an exception only in the case of the appellant.*

Further, the CBDT Circular No. 6/2016 dated 29.02.2016 relied upon by the appellant and as reproduced hereinabove, clearly supports the issue raised in this appeal and stands fully covered by the said Circular. It is a fact that the appellant has treated the shares and securities as "Investment" and not as "Stock-in-trade" in the year under appeal as well as in past years. Therefore, in view of the above CBDT Circular, the AO is not permitted to take a contrary view in the year under appeal and claimed that the shares and security is stock-in-trade and, therefore, the profit/gain caused to the assessee be treated as business income. Further, it is also a fact as came out from the assessment order that the AO has not doubted the Genuineness of the transaction of purchase and sale of shares. The only controversy raised by the AO is to treat the short term capital gain of Rs. 1,75,77,642/- shown by the appellant as business income.

*Therefore, considering the totality of the facts, replies pursuant to the inquiries conducted by the A.O, u/s. 133(6) and as discussed in detail hereinabove, CBDT Circular 6/2016 dated 29/02/2016, the action of the AO in considering Rs. 1,75,77,642/- as income from business and adventure in the nature of trade, is not found to be coming from the facts of the case and records and therefore, considering the Circular dated 15th June 2007 and the judgment of the Hon'ble Supreme Court in the case of **CIT v/s. Devasan Investment (P) Ltd.** (2015) 53 Taxmann.com 219, wherein profit from sale and purchase of shares has been treated as capital gain in the cases where investment in shares was made with the object of capital appreciation and having infrequent - handful transactions. The facts of the present case are also similar and in view of elaborate findings given hereinabove, the transactions are considered as short term capital gain. The grounds 1 to 3 are allowed.*

3. *In the result, the appeal is **allowed.***”

Thus, the CIT(A) reversed the action of the AO.

5. Aggrieved, the Revenue preferred appeal before the Tribunal against the aforesaid order of the CIT(A).

6. The learned DR for the Revenue at the outset relied upon the order of the AO and submitted that the AO has clearly demonstrated in the given facts of the case that the assessee was indulging in frequent purchase and sale of shares which indicates a systematic activity of business nature. This apart, another noticeable fact is that the shares so purchased have been retained in the brokers' pool account as the intention towards purchase was clearly to resale the same within a very short span of time to take advantage of market fluctuations. The learned DR thereafter submitted that another point of significance is that the assessee has not even made payment for purchase of shares and the purchase liability was squared off by the sale consideration and assessee has simply earned the differential income owing to market fluctuation. The learned DR thus spearheaded that when these facts are cumulatively seen, there can be no iota of doubt about the dominant intention of the assessee to be engaged in an adventure akin to commercial activity of purchase and sale of shares. The learned DR thereafter adverted our attention to purchase and sale of one of the scrip namely 'Onelife capital' which has virtually generated the impugned profits in question. Expanding the contentions with reference to the aforesaid scrip, the learned DR submitted that the purchase value of the aforesaid scrip is more than Rs.40 Crores . The assessee has not paid the aforesaid sum to the broker at all. The shares were purchased on behalf of the assessee and merrily kept in the pool account to maintain strangle hold on the outstanding purchase money. The shares were thereafter resold in a short period and the

delivery was given in the market out of pool account and thus the assessee was never in actual position of the scrip which is claimed to be capital investment. The learned DR thus submitted that the assessee has neither discharged his payment obligation against the purchase nor has taken delivery in his demat account after purchase unlike an investor. It was thus canvassed that there is wide gap between the narrative of the assessee and actual facts. It was thus vociferously contended that the assessee has merely taken advantage of the market fluctuation by leveraging his financial transaction by making payment only in the form of margin money. The learned DR added that this was the continuing status. The learned DR quipped that the profits arising on such activity of high risks and exposure cannot be deemed as action of capital appreciation of any sort. Adverting to the order of the CIT(A), the learned DR submitted that the CIT(A) has adjudicated the issue in favour of the assessee on extraneous consideration. The genuineness of purchase and sale of shares is not in question as purported. The taxability under the correct head of income is the point in deliberation which is dependent upon relevant factors. The learned DR submitted that the tell-tale facts of keeping the delivery with the broker, non-payment against purchases except some margin money and re-sale within short span of time has not been weighed by the CIT(A) at all despite taking note of the same in isolation. The learned DR thus submitted that the CIT(A) has committed gross error in finding fault with the reasoned order of the AO and arriving at conclusion totally divorced of facts. The learned DR thus urged that the action of the CIT(A) requires to be set aside and the order of the AO is required to be upheld.

7. The learned AR for the assessee, on the other hand, broadly relied upon the order of the CIT(A) and submitted that the assessee in his books of accounts has treated the transactions under the head

'investment' which reflects the paramount intention of the assessee to hold the shares as 'capital asset' with the view to enjoy the yield in the form of dividend. It was submitted that it is a different matter that shares were resold in a short span of time due to early opportunity available in market, which has no impact on the initial intention at the time of purchase of shares. The learned AR thereafter submitted that merely because shares were held in the pool account no adverse inference could be drawn for the reason that the constructive delivery of the shares were always with the assessee. As regards payments against purchases, the learned AR for the assessee observed that the payment obligations have been ultimately discharged and therefore such point does not carry any weight. The learned AR also submitted that the shares held at the end of the year have been reflected under the head 'investment' (asset) in the financial statement which underscores the intention of the assessee to hold the shares as investments. Drawing distinction the AR argued that the investments in shares have been valued 'at cost' unlike cost or market value as applicable to shares held as stock-in-trade. The learned DR next contended that the position of the assessee as investor has been adopted in the earlier years as well as in subsequent assessment year. The learned AR accordingly submitted that the CIT(A) has rightly appreciated the facts in its proper perspective and no interference thereof is called for.

8. We have carefully considered the rival submissions and the assessment order as well as the order of the CIT(A) appealed against and also various documents referred to at the time of hearing and case laws cited. The solitary issue for adjudication is whether profits earned on sale of certain shares by the assessee in the relevant assessment year is required to be taxed under the head 'capital gains' (at concessional rate) as offered by the assessee or is to be treated as

‘business income’ (susceptible to tax at higher rate) of the assessee as realigned by the AO.

8.1 The issue involved is essentially factual in nature and depends squarely upon the totality of facts of a given case.

8.2 With regards to the justification of claim as short term capital gain, it is the case of the assessee that shares were acquired and purchased with an intention to enjoy capital accretion and were held as ‘capital asset’ in the nature of ‘investment’ prior to its sale. As noticed, the assessee in the instant case has purchased certain shares through stock broker and thereafter resold the same within a very short span of time. The transaction of impugned purchase and sale has given rise to the profits of Rs.1,75,77,642/- which was brought to tax by the Revenue as ‘adventure in the nature of trade’ under s. 28 r.w.s. 2(13) of the Act. The CIT(A) has reversed the action of the AO and admitted the claim of the assessee for its chargeability at its concessional rate under the head ‘capital gains’.

8.3 The Revenue has disputed the aforesaid action of the CIT(A) before us on various counts. Firstly, it is the case of the Revenue that purchase and sale transactions of shares bear the trappings transactions of commercial motive and secondly, profits arising therefrom is chargeable under s.28 of the Act under the head ‘business income’ in contrast to the stand of the assessee seeking to treat the shares so purchase as ‘capital asset’ and thus for taxing the resultant profits on its sale as ‘capital gains’ under s.45 of the Act.

8.4 We notice the fundamental case of the Revenue is that shares so purchased have not been transferred to the demat account of the assessee at all but broker acted as holder in due course by keeping

such shares in its pool account which underlines the real motive of the assessee to resale the same in quick time with a view to make profits from market volatility. We also take notice of another significant argument placed on behalf of the Revenue that the purchase consideration has not been paid to the broker by the assessee at all and has been merely set off against the sale consideration received at a later date. This exemplifies the fact that the shares were intended to be held as trading asset for a short period with a view to make immediate profits. It is true that intentions to hold asset as 'trading asset' or a 'capital asset' are in-capable of any cogent proof. Intentions can at best be inferred on the basis of facts and circumstances of each case. When seen objectively, it is noticed that the whopping profits of Rs.1.75 Crore has essentially been generated from purchase and sale of one of the shares namely 'Onelife capital'. The purchase consideration as tabulated in the assessment order exceeds Rs.40 Crores. The payment of such purchase consideration has admittedly not been made. In other words, the purchases of shares have been predominantly financed by the broker. The shares were held at the disposal of the broker in its pool account which inevitably mean that it primary acts as a kind of security against outstanding payment. The shares have been quickly sold and extraordinarily profits have been generated without employing any worthwhile fund. The profits are thus ostensibly made owing to risk taking capacity of the assessee. These speaking facts clearly suggest the intention of assessee to hold the shares for resale in immediate future with a view to make profits essentially on risk perception. The profit/loss from such activity thus has visible characteristics of business income.

8.5 Needless to say, merely because shares have been shown in the books of accounts as 'investment' as claimed, the same by itself will not override the dominant intention apparently visible from entire

gamut of action of the assessee. The manner of entry in book is thus not always decisive in determining the underlying intentions of an assessee. In the absence of payment or delivery, the entire explanation for initial intention to hold the shares for long period for capital appreciation purposes is bald and unverifiable.

8.6 The action of the assessee does not coincide with the behavior of a investor of ordinary prudence. Pertinently the assessee has also not demonstrated the financial capacity to invest such large sum for purchase of shares. In the absence of financial resources, it is rather difficult to perceive the position of assessee as investor. Mere averment of generic nature would not in our view justify the stand of the assessee as investor. Similarly mere disclosure of the transaction in a particular way in its books of accounts would not grant any indefeasible right to claim that each and every transactions of shares undertaken by the assessee is of capital nature. The issue for determination depends on totality of facts of each case. As noted the impugned transaction of purchase and sale (mainly of Onelife capital) giving rise to dispute is beset with uncharacteristic features which are akin to an adventure in the pursuit of trade rather than a capital transaction.

8.7 Pertinent to note here that the Hon'ble Supreme Court in the case of Dalmia Cement Ltd. vs. CIT (1976) 105 ITR 633 (SC) held that it is not possible to evolve any single legal test or formula which could be applied in determining whether a transaction is an adventure nature of trade and that the answer to the question must depend in each case on the total impression and the fact of all the relevant factors and circumstances proved therein and which determined the character of the transaction.

8.8 The cumulative facts and circumstances seen holistically and read in conjunction with the tests or parameters laid down by various judicial precedents provide sound basis to infer the intention of commercial activity in the impugned transaction by taking unprecedented market risks.

8.9 The CIT(A), in our view, has taken a very hawkish view of the glaring facts. A reference has been made by the CIT(A) to the Circular No. 4/2007 dated 15th June, 2007 which summarizes the parameter laid down by the various judicial authorities to weigh as to whether the transaction is an 'business activity' or 'investment activity'. However, we fail to understand as to how the parameters laid down in the aforesaid circular helps the case of the assessee. The CIT(A) while admitting that such issue cannot be decided on any abstract rule or formula, but however has proceeded on the ground that same were declared in the balance sheet without any borrowed funds and shares kept in the pool account does not give rise to adverse rule. In our view, the opinion formed by the CIT(A) in favour of the assessee is totally mis-placed in the gross facts noted above. The intention of the assessee to engage in purchase without involvement of money and quick sale thereof with a commercial motive is overtly clear without any doubt. To infer the purchase of shares without deployment of funds and without receipt of actual delivery of shares as intended to be as investment activity, in our view, wholly incomprehensible. The subsequent conduct of resale at a short span of time only reinforces the otherwise visible trading intentions right from its beginning. Mere declaration of shares as 'investments' of capital nature in the books, will not, in our view, alter the inherent character of the transaction. The issue being dependent on facts, the acceptance of short term capital gain in other assessment years cannot operate as res-judicata and AO is not bound by such orders on the ground of

estoppel of some sort. We thus find ourselves in complete agreement with a view taken by the AO and find little merit in the reasoning adopted by the CIT(A) while displacing the action of the AO. In the result, we set aside the order of the CIT(A) and affirm the action of the AO.

9. In the result, the appeal of the Revenue is allowed.

This Order pronounced in Open Court on 29/01/2019

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER
Ahmedabad: Dated 29/01/2019

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रहित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।