

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above captioned cross appeals by the assessee and the Revenue are preferred against the very same order of the Id. CIT(A) - 7, New Delhi dated 24.01.2020 pertaining to Assessment Year 2015-16. Since the underlying facts in both these cross appeals are same and were heard together, therefore, they are disposed of by this common order for the sake of convenience and brevity.

2. Representatives of both the sides were heard at length. Case records carefully perused. Relevant documentary evidence brought on record duly considered in light of Rule 18(6) of the ITAT Rules. Judicial decisions considered wherever necessary.

3. Facts coming out from the assessment record show that the assessee filed its return of income on 30.09.2015 declaring income of Rs. 3,70,92,720/-. Return was selected for scrutiny assessment under CASS and, accordingly, statutory notices were issued and served upon the assessee.

4. During the course of scrutiny assessment proceedings and on perusal of the computation of income, the Assessing Officer noticed that the assessee has shown Long Term Capital Gains [LTCG] and Short Term Capital Gains [STCG] on sale of shares. The Assessing Officer found that the assessee is engaged in the business of trading in securities and formed a belief that profit arising from sale of shares should be treated as “business income” and accordingly, issued a show cause notice to the assessee to explain why the profit should not be taxed as “business income”.

5. The assessee filed a detailed reply and explained that the management of the company, on the beginning of the financial year, decided to treat some shares as investment, which were purchased long time back. It was strongly contended that since the stock in trade was converted into capital asset/investment, therefore resulting profits should be dealt with according to the provisions of the capital gain.

6. The contentions of the assessee were dismissed by the Assessing Officer who was of the firm belief that profits arising from transfer of securities shall be taxable under the head “Profits and Gains of

Business or Profession” only and completed assessment by treating the gains as profits of business.

7. The assessee challenged the assessment before the Id. CIT(A) and reiterated its claim that stock in trade was converted into investment in respect of those shares which were purchased long time back. It was also pointed out that since the conversion, the assessee has been holding shares as investment in subsequent years also.

8. After considering the facts and submissions and other related facts, the Id. CIT(A) accepted that the assessee had taken actual delivery of all shares which were purchased by it. Drawing support from the CBDT Circular No. 6/2016, the Id. CIT(A) accepted the contention of the assessee to the extent of LTCGs of Rs. 5,04,52,174/- and held the same as LTCGs. However, in respect of STCGs, the Id. CIT(A) was of the opinion that the CBDT Circular is only in respect of LTCGs and accordingly, treated Rs. 3,70,97,670/- as “Business Income.”

9. The Revenue and assessee are in appeal before us on such finding.

10. We have given thoughtful consideration to the findings of the Id. CIT(A). There is no dispute that at the beginning of the financial year, the assessee has converted its stock in trade of shares as investment in shares, which is evident from the following Resolution of the Board of Directors:

"A proposal has been put before the Board to treat the listed shares held by the company as en the closing of the financial year i.e. 31.03.2014, as Investment in the light of the fact that the company is not trading in shares with the intent of earning business profits out of such activities and hence forth such non-frequent activities of delivery based purchase of shares should not be considered as trading activities. The Board considered the proposal and passed following resolution unanimously.

"Resolved That the stock of shares & securities as held on 31" March,2014 would be treated as Investment here in onwards and the relevant effect of this regard would be given in the books of accounts and while making transactions in respect of these stocks. Similarly, all the future transactions of purchase of listed shares must be purchased with the intent of investments and would be treated as investments in the books of accounts here onwards."

11. In the balance sheet for the year under consideration, changes in Inventory has been shown a under:

Particulars	For the year ended 31 st March 2015	For the year ended 31 st March 2015
Inventory at the end of the period		
Shares	37440320.00	55365844.00
(a)	37440320.00	55365844.00
Inventory at the beginning of the period		
Shares	53165843.44	63884669.59
Trf to Inv	50063844.00	
(b)	5101999.41	63884669.59
(Increase/Decrease in Inventory (b-2))	32338320.56	8718825.59

12. On the Asset side in the Balance Sheet, shares have been shown under the head “Non Current Investments”.

13. On the aforementioned facts, let us now consider the CBDT Circular No. 6/2016 which is as under:

“Circular No.6/2016

**Government of India
Ministry of Finance Department of Revenue
Central Board of Direct Taxes**

North Block, New Delhi, the 29th of February, 2016

Sub: Issue of taxability of surplus on sale of shares and securities - Capital Gains or Business Income - Instructions in order to reduce litigation - reg.-

Sub-section (14) of Section 2 of the Income-tax Act, 1961 ('Act') defines the term "capital asset" to include property of any kind held by an assessee, whether or not connected with his business or profession, but does not include any stock-in-trade or personal assets subject to certain exceptions. As regards shares and other securities, the same can be held either as capital assets or stock-in-trade/ trading assets or both. Determination of the character of a particular investment in shares or other securities, whether the same is in the nature of a capital asset or stock-in-trade, is essentially a fact-specific determination and has led to a lot of uncertainty and litigation in the past.

2. Over the years, the courts have laid down different parameters to distinguish the shares held as investments from the shares held as stock-in-trade. The Central Board of Direct Taxes ('CBDT') has also, through Instruction No. 1827, dated August 31, 1989 and Circular No.4 of 2007 dated June 15, 2007, summarized the said principles for guidance of the field formations.

3. Disputes, however, continue to exist on the application of these principles to the facts of an individual case since the taxpayers find it difficult to prove the intention in acquiring such shares/securities. In this background, while recognizing that no

universal principal in absolute terms can be laid down to decide the character of income from sale of shares and securities (Le. whether the same is in the nature of capital gain or business income), CBDT realizing that major part of shares/securities transactions takes place in respect of the listed ones and with a view to reduce litigation and uncertainty in the matter, in partial modification to the aforesaid Circulars, further instructs that the Assessing Officers in holding whether the surplus generated from sale of listed shares or other securities would be treated as Capital Gain or Business Income, shall take into account the following:

(a) Where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income,

b) In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if 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. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years;

c) In all other cases, the nature of transaction (i.e. whether the same is in the nature of capital gain or business income) shall continue to be decided keeping in view the aforesaid Circulars issued by the CBDT.

4. It is, however, clarified that the above shall not apply in respect of such transactions in shares/securities where the genuineness of the transaction itself is questionable, such as bogus claims of Long Term Capital Gain / Short Term Capital Loss or any other sham transactions.

5. It is reiterated that the above principles have been formulated with the sole objective of reducing litigation and maintaining consistency in approach on the issue of treatment of income derived from transfer of shares and securities. All the relevant provisions of the Act shall continue to apply on the transactions involving transfer of shares and securities.

(Rohit Garg)

Deputy Secretary Government of India

F.No.225/12/2016-ITA-11 "

14. A perusal of the aforementioned Circular clearly shows that the Board was concerned with the Courts having laid down different parameters to distinguish the shares held as investment from the

shares held as stock-in-trade. Board was also concerned with the disputes continuing even after the decision of the High Courts. Board also recognized the fact that it is very difficult for tax payers to prove the intention in acquiring such shares and accepted that no universal principle in absolute terms can be laid down to decide the character of income from sale of shares and securities.

15. Therefore, to put an end to the ongoing litigations, the Board issued the aforementioned Circular instructing the Assessing Officers and in the concluding para, the Board has reiterated that the principles have been formulated with the sole objective of reducing litigation and maintaining consistency in approach on the issue of treatment of income derived from transfer of shares.

16. In light of the aforementioned Circular, we have no hesitation to hold that the intention of the assessee is paramount. If the assessee has decided to hold the shares as investment and the conduct of the assessee is in line with his intention, then the profits arising from sale of such investment shall be taxed as capital gains, long term or short term.

17. Even the Board has recognized the fact that a taxpayer may have dual portfolio - one - as investment in shares and the other, as stock in trade of shares. Resolution of the Board of Directors mentioned elsewhere squarely lays down the intention of the assessee that since the holding in shares were of several years, therefore, the same should be held as investment.

18. The intention of the assessee can also be gathered from the Balance sheet and Financial Statement of Accounts. Shares held by the assessee as investment are chargeable to tax under the head “Capital Gains” and shares held by the assessee as stock in trade are chargeable to tax as “Business Income”.

19. Based upon the CBDT Circular, when the Id. CIT(A) accepted the long term capital gain, then we fail to understand why the Id. CIT(A) hesitated in not accepting the short term capital gain on the same set of facts.

20. On a specific query from the Bench, in respect of the stand taken in subsequent years, the Id. counsel for the assessee pointed out that profits on sale of shares in subsequent years have been accepted as

capital gains. This is also in line with the aforementioned CBDT Circular.

21. On similar set of facts, the Hon'ble Delhi High Court in the case of Express Securities Pvt Ltd 364 ITR 488 on the following facts held as under:

Facts

"The assessee is a company. In the return for the year in question, it had declared long-term capital gain of {- Rs. 3,34,65,931/- and the said gain was claimed as exempt under Section 10(38) of the Income Tax Act, 1961 (Act, for short). The respondent-assessee had claimed before the Assessing Officer that they were maintaining two sets of portfolio, i.e., investment and trading portfolio and the shares, which were sold and subject-matter of long-term capital gains, were held in the investment portfolio. This factual position was not disputed."

Held

- . "6. The commissioner [Appeals] has observed that in the balance sheet as on 31st March, 2005 the shares were shown under the head "inventories" and in the subsequent balance sheet as on 31st arch, 2006 shares were again shown under the head

"investment at book/fair value on 1st April, 2004". Thus, the assessee converted the aforesaid stock-in-trade of Rs. 3,18,38,850/- to the head "investment at book fair value on 1st April, 2004" and the said disclosure was made in the balance sheets as on 31st March 2005 and 31st March, 2006. In the first year, the Assessing Officer did not disturb the aforesaid conversion and accepted the same. The Commissioner (Appeals) noticed that for the Assessment Year 2005-06 assessment was concluded under Section 143(3) vide order dated 27th November, 2007 but the Assessing Officer did not object to the said conversion. These shares were subsequently sold as detailed in paragraph 2.9 of the order of the Commissioner (Appeals) in August, 2005, September, 2005 and substantial portion was sold in March, 2006 and long-term capital gains was declared/ He observed that statute did not reject or frown upon conversion of stock-in-trade into investment and the said conversion was permissible. Commissioner (Appeals) referred to the Circular No. 4/2007 dated 15th June, 2007 issued by the Central Board of Direct Taxes, which stipulates that two portfolios one for stock-in-trade and one in respect of investments could be maintained by the same assessee. He took into account the period of holding by the assessee and the fact that the conversion into investment was made on 1st April, 2004 and outlay was disclosed in the audited accounts for the Assessment Year 2005-06. The sales made, as noticed above, were after considerable delay of approximately two years thereafter.

7. In view of the aforesaid factual findings recorded by the Id. CIT(A) and the Tribunal, we do not see any reason to interfere and issue notice on the main appeal. Accordingly, we are not inclined to issue notice on the application for the condonation of delay on the same and consequently, the appeals are dismissed."

22. Similarly, the Hon'ble Delhi High Court in the case of Sukarma Finance Ltd ITA No. 110/2015 order dated 15.04.2015, on the following facts:

"3. The assessee is involved in investment business and had during the AY 2005-06 converted a part of its stock in trade into investment and maintained a separate account on that score. The realization on account of its investment was offered in capital gains under two heads, i.e., long term capital gain and short term capital gain. For the assessment year in question, the claim for long term capital gain was accepted by the Assessing Officer but the claim for short term capital gain was disallowed. The Assessing Officer reasoned in this regard as follows: -

"4.5 In the instant case, except one condition i.e. utilizing own funds all other conditions are against the assessee. The assessee was a trader in the past and in order to take tax rate advantage the transactions are shown as STCG thus raising a question mark on the intention of the assessee. A large number of transactions have been made, purchase & sale

transactions worth more than 14 crores have been made and hence volume of transactions is high. The activity was not only incidental in nature but the stock was converted into investment to take advantage of concessional tax rate. It is also pertinent to recall that in his audit report the auditor has also described the business of the assessee company as „share trading“ and not an investor. Therefore, in the light of above discussion there is no doubt that the profits earned by the assessee in the year were to be assessed as business income and not short term capital gain. Accordingly, I treat the income of Rs.41,46,235/- shown by the assessee as short term capital gain as business income. I am satisfied that by showing business income to the extent of Rs.41,46,235/- as short term capital gain the assessee has furnished inaccurate particulars of his income for which penalty proceedings u/s 271 (1)(c) are initiated separately."

Held as under:

"5. We are of the opinion that in the given facts of the case, the mere circumstance that for the previous year, a part of the stock in trade was converted into investments would not have been conclusive as to whether the realization out of purchase and sale of shares was by way of income from business. The AO had accepted the assessee's claim for long term capital gains and completed the assessment. Having done so, he could not have fallen back upon the facts of the previous years when the conversion took place. Furthermore, we are of the opinion that the ITAT duly considered the applicable law in

deciding that the income was not business income but in fact short term capital gain. The question of law urged, therefore, does not arise."

23. Considering the facts in totality, in light of the decision of the Hon'ble Jurisdictional High Court of Delhi [supra], we are of the considered opinion that the gains arising out of sale of shares should be taxed as LTCGs and STCGs as declared by the assessee. Accordingly, the appeal of the assessee is allowed and that of the Revenue is dismissed.

24. In the result the appeals of the assessee in ITA No. 1320/DEL/2020 is allowed whereas the appeal of the Revenue in ITA No. 1166/DEL/2020 is dismissed.

The order is pronounced in the open court on 25.09.2023.

Sd/-

**[ASTHA CHANDRA]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 25th SEPTEMBER, 2023.

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
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	