

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

**BEFORE SH. S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
SH. SUDHIR KUMAR, JUDICIAL MEMBER**

ITA No.785/Del/2020
Assessment Year: 2006-07

M/s. Sat Sahib Securities Pvt. Ltd. Pvt. Ltd., B-129, Anand Vihar, New Delhi-110092 PAN No.AABCS2456G	Vs	DCIT Circle – 7 (1) New Delhi
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Raghav Sharma, CA
Respondent by	Sh. Vivek Kumar Upadhyay, Sr. DR

Date of hearing:	25/06/2024
Date of Pronouncement:	12/07/2024

ORDER

PER SUDHIR KUMAR, JM:

This appeal by the assessee is preferred against the order passed by the Commissioner of Income Tax (Appeals)-XXV, New Delhi (hereinafter referred as 'CIT(A)' dated 11.12.2019 pertaining to A.Y. 2006-07 under section 254/143(3) arises out of the assessment order passed by Addl. CIT, Range-7,

New Delhi under Section 143(3) of the IT Act, 1961 (herein after referred as the “Act”)

2. Aggrieved by the order of the Ld CIT(A), the assessee is in appeal before us by raising the following grounds of appeal:-

1. *That the Ld. CIT(A) has erred on facts and in law in upholding the action of the AO in treating the short – term capital gain of Rs.67,87,654/- as the business income of the appellant.*
2. *That the Ld. CIT(A) has erred on facts and in law in upholding the action of the AO in treating the short-term capital gain of Rs.67,87,654/- as the business income of the appellant ignoring the fact of the assessee’s case and also ignoring the guidelines prescribed by CBDT circular no.4/2007 dated 15.06.2007.*
3. *That the Ld. CIT(A) has erred on facts and in upholding the action of the AO in law in treating the short-term capital gain of Rss.67,87,654/- as the business income of the appellant and has totally disregarded the rule of consistency, without there being any charge in the working of the assessee and despite the fact that the revenue had treated*

these transactions as Capital Gains for the A.Y. 2004-05 and 2007-08 and order passed u/s. 143 (30 A.Y. and 2005-06 order passed u/s. 143 (1) and A.Y. 2008-09 by the order passed by CIT- Appeals.

- 4. Those provisions of section 234B are not applicable in the case of the appellant.*
- 5. That the impugned appellate order is arbitrary, illegal, bad in law and the violation of rudimentary principle of contemporary jurisprudence.*
- 6. That the appellant craves leave to add, amend, alter vary and / or withdraw any or all the above grounds of appeal before or at the time of hearing of the appeal.*

3. The brief fact of the case is that the company is engaged in the business of financial services i.e. dealing in investment in shares, stock, debenture, debenture stocks, bonds, certificates, obligation, securities of any government, local exchange or otherwise and to subscribe for the same or to guarantee the subscription thereof. Apart from above, it has also shown income from Capital Gains and Income from Other Sources (Dividend). The assessee company has shown a total income of Rs 1,8737259/- under three different heads i.e income from business is at Rs 4,29,169/- income from long term capital gain

at Rs 1,09,41,612/- and short term capital gain of Rs 67,87654/-. Apart from that, the assessee has also shown income from dividend which has been claimed as exempt income.

4. The assessee has filed return of income, declaring at Rs.72,16,819/-. The case of the assessee was selected for scrutiny and assessment under section 143(3) has been framed on 24-12-2008 assessing the total income of Rs. 72,64,083/-. The AO had made the addition of Rs. 6787654/- on account of treatment of STCG as income from business and disallowance made u/s 14A at Rs 47264/-. Aggrieved the order of the AO the assessee has filed the appeal before the Ld CIT(A) who vide order dated 09-09-2010 has deleted the addition of Rs.67,87,654/-and upheld the addition of Rs.47264/-. Aggrieved with the order of the Ld CIT(A), the revenue has filed the appeal before the Ld ITAT . The Hon'ble ITAT G Bench vide its order dated 13-07-2012 in ITA 5440/Del/2010 restored the matter to the AO with observing the following direction;

“8. We have heard both the sides. We have also gone through the case laws relied upon by both the sides and also the relevant instructions issued by CBDT on this issue. There is a distinction between shares held

as investment and shares held as stock-in-trade. Firstly, to ascertain the real character of the holding of shares, we have seen how these shares have been dealt in the books of account of the assessee. No doubt, in this case, these shares have been valued at cost. These have not been valued on the basis of cost price or market price, whichever is less, which is normally done in the case of the stock-in-trade. Assessee had shown these shares as investment in books of account. We would also like to state that the assessee was a company registered for trading in shares which is clear from the Memorandum of Articles of the Association wherein the main objects of the company is to act as stock and share brokers and take the membership of the stock exchanges. This fact is also clear from the order of the Assessing Officer passed for the year 2004-05 u/s 143(3) that the assessee's National Stock Exchange ticket was surrendered in May, 2001. Assessee had shown shares in investment and valued these on cost at the end of the year. Thus, these facts go in favour of the assessee to show that these were investments. However, this alone shall not be sufficient to determine the true character of these transactions. The second

aspect which needs to be considered for deciding the character of the shares is objective of the investment in the shares. In assessee's case, there was a surplus earned of Rs.67,87,654/- on the purchase and sales of shares held for less than a year. Transactions are of large numbers. Normally an investor does not enter into so many transactions where profit is not the motive. The object of transactions can be seen only by the income derived as a dividend whether the transaction was entered into was to earn dividend or to earn the profit. The total dividend earned by the assessee during the year was Rs.9,45,281/-. However, it is not clear whether this dividend earned was on the shares transacted on which the surplus of Rs.67,87,654/- earned or it pertains to the other units of shares where long term capital gain earned or mutual funds held by the assessee. This is the most crucial aspect which can decide the real character of the shares transacted by the assessee. There is no material on record which can throw light on this aspect. True facts are to be brought on record for this purpose. Therefore, in our considered view, this aspect requires a verification at the level of Assessing Officer.. The frequency of the purchases and sales of shares

and volume is quite substantial. The purchases have been made more than 300 times and the corresponding sales have also been made in almost equal number of transactions. Therefore, the character of the shares held, whether they were investment or trading assets can be looked into only by verifying the source of dividend income, on pal which shares the dividend income had been earned. Whether the shares on which short term capital gain shown by the assessee were sold just prior to the declaration of the dividend date or these were sold post dividend. All these aspects are necessary to ascertain the objective of the assessee in investment in these shares. If the motive of investment is to realize profit by making purchases and sales of shares then it shall be definitely trading assets and the profits shall be treated as a business income, but if the objective of the investment is to derive income by way of dividend then the transaction of purchases and sales of shares would definitely yield capital gain and not business profit. For this aspect, we restore the issue to the file of Assessing Officer.”

5. In the compliance of the direction of the Hon'ble ITAT the, AO has again framed the assessment vide order dated 26-02-2014 and assessed the income of Rs 7264080/- treated as business income. Aggrieved the order of the AO the assessee has preferred the appeal before the Ld CIT(A) who affirmed the assessment order made by AO hence the assessee again appeal before us.

6. We have heard the parties and perused the material available on record.

7. Before us at the outset Ld DR supported the order of the AO and submitted that in the compliance of the Ld. ITAT Delhi the AO again assessed the income of the assessee. The AO therefore for the reasons noted in the order made the additions. He has submitted that Ld CIT(A) thereafter for the reasons noted in the order has dismissed the appeal. Therefore, he submitted that the order of CIT(A) be upheld.

8. Ld. Counsel for assessee has submitted that assessee has earned the income from the dividend which was shown in the profit and loss account. He has further submitted that intention of the assessee behind the investment was to earn the dividend and not to earn the profit. He has also submitted that assessee

company was registered as share broker and as per the Memorandum of Association, the main object of the company was to deal in stocks and shares and to be a Member of Stock Exchange of India and abroad. However the assessee company surrendered NSE Ticket in May 2001. Thereafter the assessee was mainly deriving the income from capital gain interest and dividend. The income of return filed by the assessee for the AY 2004-05, 2005-06, 2007-08, 2008-09 & 2010-11 have been accepted or treated the income of assessee from the sale and purchase of shares as capital gain which shown from the table given below:

A.Y.	Treatment by Assessee	Treatment by AO	Order u/s.	Result on appeal before CIT(A)	Final Treatment	P.No.of PB
2004-05	Business income	Capital Gain	143(3)	No Appeal	Capital Gain	46-50
2005-06	Capital Gain	Capital Gain	143(1)	No Appeal	Capital Gain	51-53
2006-07	Capital Gain	Business income	143(3)	Capital Gain	Capital Gain	57-66
2007-08	Capital Gain	Capital Gain	143(3)	No appeal	Capital Gain	54-56
2008-09	Capital Gain	Business income	143(3)	Capital Gain	Capital Gain	67-75
2010-11	Capital Gain	Business	143(3)	Capital	Capital Gain	76-89

		income		Gain		
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9. He has further submitted that AO has totally ignored the principle of consistency. The revenue itself accepted the income of the assessee from the purchase of shares as capital gain in the A.Y 2004-05, 2005-06, 2007-08, 2008-09 & 2010-11. Ld Counsel has relied the following Judicial pronouncements; Commissioner of Income Tax vs Gopal Purohit (2010)78 CCH0012 Mum HC in case the Hon'ble Bombay High Court held that :-

“2. The Tribunal has entered a pure finding of fact that the assessee was engaged in two different types of transactions. The first set of transactions involved investment in shares. The second set of transactions involved dealing in shares for the purposes of business (described in para 8.3 of the judgment of the Tribunal as transactions purely of jobbing without delivery). The Tribunal has correctly applied the principle of law in accepting the position that it is open to an assessee to maintain two separate portfolios, one relation meld investment in shares and another relating to business activities involving dealing in shares. The Tribunal held that the delivery based transactions in the present case, should be treated as those in the nature of investment transactions and the profit received

there from should be treated either as short-term or, as the case may be long-term capital gain, depending upon the period of the holding. A finding of fact has been arrived at by the Tribunal as regards the existence of two distinct types of transactions namely, those by way of investment on one hand and those for the purposes of business on the other hand, Question (a) above, does not raise any substantial question of law.

3. Insofar as Question (b) is concerned, the Tribunal has observed in para 8.1 of its judgment that the assessee has followed a consistent practice in regard to the nature of the activities, the manner of keeping records and the presentation of shares as investment at the end of the year, in all the years. The Revenue submitted that a different view should be taken for the year under consideration, since the principle of res judicata is not applicable to assessment proceedings. The Tribunal correctly accepted the position that the principle of res judicata is not attracted since each assessment year is separate in itself. The Tribunal held that there ought to be uniformity in treatment and consistency when the facts and circumstances are identical, particularly in the case of the assessee. This

approach of the Tribunal cannot be faulted. The Revenue did not furnish any justification for adopting a divergent approach for the assessment year in question. Question (b), therefore, does not also raise any substantial question.

4. In so far as Question (c) is concerned, again there cannot be any dispute about the basic proposition that entries in the books of account alone are not conclusive in determining the nature of income. The Tribunal has applied the correct principle in arriving at the decision in the facts of the present case. The finding of fact does not call for interference in an appeal under s. 260A. No substantial question of law is raised. The appeal is accordingly dismissed.”

10. Commissioner of Income Tax -I vs Niraj Amidhar Surti in Tax appeal no 836 of 2009 the Hon'ble Gujarat High Court held that

“Income Tax : Section 28: Whether In view of the fact that substantial investment of the assessee has been accepted by the department as investment in shares the AO was not justified in assessing small portion of investment as business income on the ground that the assessee has borrowed funds for these investment and was not the

owner of the shares ignoring that the impugned shares were held for fourteen months by the assessee Held Yes

Assessee a Chartered accountant showing Income from profession and from purchase and sales of shares. During the impugned assessment year assessee has shown Long Term Capital gain from the sale of shares of Euro Asian Securities. Assessing Officer came to the conclusion that the income shown from sale of shares of Euro Asian Securities Ltd. was, in fact, assessable as business Income of the assessee. According to the Assessing Officer the dealing in the shares of Euro Asian Securities Ltd. CIT (A) allowed the appeal of the assessee, ITAT affirmed the order of the CIT (A). Matter reached to the High Court wherein it has been observed that merely because the assessee has purchased the impugned shares from funds borrowed at higher rate of interest and the assessee was not the real owner it cannot be said the transaction entered by the assessee was adventure in nature of trade.

After hearing the parties the High Court held as under:-

++The Tribunal, in the impugned order, has concurred with the findings of fact recorded by Commissioner (Appeals). The Tribunal upon appreciation of the evidence on record has found that the facts and circumstances of the present

case satisfy all Commissioner of Income Tax out 13 TR 735 (2002-T1QL-780-58 II) and Khan Bahadur Ahmedala 1993. Commissioner of Income case Andhra Pradesh, [1968] 68 TR 573ding one issue involved in the present said is squarely covered in favour 573, and that the issue involved in the present case is squarely covered in favour of the assessee and against the revenue by the said decisions.

++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.

++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 Maniram 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.

the tests laid down by the Supreme Court in P.M. Mohammed Meerakhan v. Commissioner of Income Tax, Kerala, [1969] 73 ITR 735 (2002-TIOL-780-SC- IT) and Khan Bahadur Ahmed Alladin & Sons v. Commissioner of Income Tax, Andhra Pradesh, [1968] 68 ITR 573, and that the issue involved in the present case is squarely covered in favour of the assessee and against the revenue by the said decisions.

++From the facts noted hereinabove, it is apparent that both the Tribunal as well as Commissioner (Appeals) have recorded concurrent findings of fact to the effect that the

assessee had disposed of most of the shares held by him after more than a year or two; the investment made in the shares of Home Trade Ltd. was not very high; the assessee had not repeated the transactions of purchase and sale of shares of M/s Home Trade Ltd.; the assessee had not shown the shares in question as stock in trade; after the shares in question were sold, the assessee made investments under the provisions of section 54BC in the Bonds of NABARD, and the profit of purchase and sale of shares or investment in mutual fund was always shown on capital account, that is, capital gains either short term or long term, and that the same was accepted as such in earlier years.

++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.

++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 Maniram 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.

++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. Moreover, in the light of

the findings recorded by Commissioner (Appeals) that the assessee had held the shares in question for fourteen months, which is a long period for the purpose of long term capital gain; the intention of the assessee had always been that of making investment in shares and not dealing in shares, which was also apparent from the fact that the shares had not been treated as stock in trade by the assessee; even after the sale, the assessee had made investment in bonds of NABARD, indicating that he had treated the same as long term capital gain; as well

as the fact that the assessee had not split the shares in lots but had sold the same in one lot; it is not possible to agree with the contention raised on behalf of the revenue that the transaction in question is an adventure in the nature of trade and therefore, the Income derived by the assessee from the said transaction is a business income and cannot be treated as capital gain. Insofar as the second ground for holding the transaction in question to be an adventure in the nature of trade, viz., that the assessee was not the legal owner of the shares and was not having physical possession thereof, is concerned, if the said ground were to be accepted, then, as had been rightly contended on behalf of the assessee, there was no transaction in the hands of the assessee and as such, there was no question of taxing the said transaction

merely on the ground that the assessee had offered the same as capital gain. It is nobody's case that delivery of shares allotted was not taken at all. The shares were held by Maniram Consultants as security towards loan advanced to the assessee indicating that the assessee was the owner of shares which were offered and held as security.

Appeal of the revenue is dismissed.

11. Ld counsel for assessee has submitted that assessee's National Stock Exchange ticket was surrendered in May 2001. Assessee has shown shares in investment and valued these on cost at the end of the year. The objective of the assessee of the investment was to derive income by way of dividend yield capital gain and not the business profit. When the assessee has filed the return of income from the business for the AY 2004-05 the AO assessed the income from capital gain, similarly for the AY 2008-09 & 2010-11 assessee has filed the return of income from the capital gain, the AO has treated income from business and the Ld CIT(A) allowing the appeal, has accepted the version of the assessee and treated the income from capital gain which became final. There was no change in circumstances or method of accounting. The assessee had held the shares for the period ranging from 5 months to 12 months. The investor may buy or

sell the shares everyday but that will not be considered such frequent as to lead to the inference of trading thus the motive of investment of the assessee was to derive income by way of dividend. The principal of consistency was not adopted by the AO. The revenue itself accepted the income of the assessee from the purchase of shares as capital gain for the A.Y 2004-05, 2005-06, 2007-08, 2008-09 & 2010-11 thus adopting the principal of consistency the income of the assessee should have been accepted as income from capital gain, so the addition made by AO treating as business income and confirmed by Ld CIT(A), to be taxed under the head of capital gain. Hence, the appeal of the assessee is liable to be allowed and order of the CIT(A) and AO are set aside.

12. In the result the appeal of the assessee is allowed.

Order pronounced in the open court on 12.07.2024.

Sd/-
(S.RIFAUR RAHMAN)
ACCOUNTANT MEMBER
NEHA, Sr. PS
Date:- 12.07.2024

Sd/-
(SUDHIR KUMAR)
JUDICIAL MEMBER