

आयकर अपीलिय अधिकरण "डी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

श्री बी.आर. बास्करन, लेखा सदस्य एवं श्री संदीप गोसाई, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI B.R. BASKARAN, AM AND SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./ITA No. 7190/Mum/2012
(निर्धारण वर्ष/Assessment Year: 2008-09)

Asst. Commissioner of Income Tax-12(2)
Room No. 134, Aayakar Bhavan
M.K. Road, Mumbai 400020

अपीलार्थी/Appellant

बनाम/ Vs.

Shri Rajesh Amratlal Shah
5, Vactoria Bldg., 1st Floor
27, Sayyad Abdulla Brelavi Road
Opp. Mumbai Samachar Press, Fort
Mumbai 40001

प्रत्यर्थी/Respondent

स्थायी लेखा सं./PAN - AAHPS4041C

अपीलार्थी की ओर से / Appellant by: Shri Uday B. Jakke
प्रत्यर्थी की ओर से/ Respondent by: Shri Viraj M. Shah

सुनवाई की तारीख /Date of Hearing : 01.12.2015
घोषणा की तारीख/Date of Pronouncement : 30.12.2015

आदेश / O R D E R

PER SANDEEP GOSAIN, J.M.

This appeal has been filed by Revenue against the order of CIT(A) dated 26.09.2012 thereby allowing the appeal of assessee against the order or assessment passed by AO vide order dated 21.12.2010.

2. Assessee has raised the following grounds before us: -

"1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred while holding the income earned on sale of shares/units as income from short term capital gain instead of business income, without*

appreciating the fact that the assessee has been frequently purchasing and selling shares/units during the year.

2. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred while holding the income earned on sale of shares/units as income from short term capital gain instead of business income, without appreciating the fact that average holding period of the securities dealt in was very short clearly indicating that the sole intention in dealing in shares/units was not for investment purpose.*
3. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred while holding the income earned on sale of shares/units as income from short term capital gain instead of business income, without appreciating the fact that the assessee has received meager dividend income during the year clearly indicating that the sole intention in dealing in shares/units was not for investment purpose."*

3. The facts of the case are that assessee is deriving salary income from M/s. Param Consultancy Services Pvt. Ltd. share of profit from M/s. Param Industries, short term capital gains and income from other sources. The AO was of the opinion that assessee has carried the business of trading in shares and all the profits/losses on such trading activity of ₹18,36,076/- was treated to be business income of assessee vide order of assessment dated 21.12.2010.

4. Aggrieved, assessee filed appeal before CIT(A) and the CIT(A) observed that it cannot be stated that assessee was engaged in trading of shares and therefore the gains earned from sale of shares in the short term was allowed as income from short term capital gains.

5. Aggrieved by the order CIT(A), Revenue is in appeal before us. The learned D.R. of the Department submitted that on scrutiny of scrip wise details it was observed that assessee had traded in about 33 different scrips. The period of holding varies from 1 day to 11 months. Most of the shares are sold within 6-7 months of the date of purchase. Total value of shares is ₹1,02,70,640/- and the shares

have been sold for ₹1,20,95,974/-. On the shares assessee has received dividend of only ₹92,037/- whereas the short term capital gains is ₹18,36,076/-, which clearly shows the intention of assessee was to trade in shares and not to earn dividend. The learned D.R. further submitted that the intention of assessee was one of the prime criterions for deciding the nature of transactions and the prime intention of assessee was to trade in shares and not as investment. The learned D.R. relied upon the order passed by AO and submitted that the AO has rightly held that assessee has carried the business of trading in shares and the profit/loss of the trading activity of ₹18,36,076/- was rightly treated as business income of assessee.

6. On the other hand, the learned A.R. for the assessee submitted that the main source of income of assessee is salary from consultancy. Assessee invested in the stock market with the intention of investing his surplus funds and earning extra income of the market scenario is favourable. Since income from sale of shares is not the main source of assessee's income and the intention is purely investment, it cannot be considered as the business of assessee. It was further submitted by the learned A.R. for the assessee that all the transactions are delivery based transactions. Further, the holding period of the shares will also suggest that he is not a day to day trader of shares. In majority of the cases the holding period ranges from 30 days to more than 300 days. Thus assessee is merely an investor and not a trader in shares. The learned A.R. for the assessee further relied on the order passed by CIT(A).

7. We have heard the parties and perused the material on record. We have perused the detailed order passed by CIT(A), which is as under: -

"2.3 The assessment order, submissions made for the appellant and materials on record have been considered. The

Hon'ble Supreme Court in the case of CIT vs. Associated Industrial Development Co. P. Ltd. reported in 82 ITR 586 as well as in the case of CIT vs. H Holck Larsen reported in 160 ITR 67 has laid down various principles, which has been considered by the CBDT for issuing the Circular No.4/2007 dated 15/06/2007. In short, the principles Laid down in those cases for deciding the question of nature of the transaction as trading or investment, mainly/broadly are; - what is the intention of the assessee at the time of purchase of shares; whether the assessee has borrowed money to purchase and paid interest thereon; what is the frequency of such purchase and disposal in that particular item; whether the purchase and sale is for realizing profit or purchases are made for retention and appreciation in its value; how the value of items has been taken in the balance sheet. Thus, no single factor can be said to be decisive factor and no single principle can be laid down to determine the nature of the transaction i.e. trading activity or investment. Each case has to be decided based on the particular facts of the said case. Therefore, there cannot be any precedent in the matter of adjudication of the issue of nature of transaction with regard to purchase and sale shares and securities. The issue can be determined only by taking into account all the relevant facts and principles as laid down by the Hon'ble Supreme Court and other High Courts. Thus, principles are taken as guidelines to be applied in the facts of each case and cannot be taken as strait jacket/formula.

2.3.1 It is seen that the appellant has traded in about 33 different scrips. It is further seen that in the 33 scrips dealt in there are no repetitive transactions, i.e., where the appellant has re-entered the market for purchase after having sold the earlier holding. There are no intra day trades, nor short sales. All transactions are stated to be delivery based. Further, out of the total capital gains of Rs.18,36,076/-, short term capital gains of Rs.17,21,540/- are for shares held for more than 300 days. The percentage of capital gains @ 93.29% is earned on the shares held for more than 100 but less than 365 days. 6.71% of capital gains is shown in respect of shares held for a period of less than 100 days in 13 transactions and less than 30 days in 23 transactions. The assessee had been consistently disclosing himself to be an investor in respect of his activity in question. The shares on which capital gains has been disclosed is being reflected by him as an investment in books. The appellant is not engaged in any like business, and has no transactions in F&O/derivatives. The appellant does not have a running account with a broker and no margin money is stated

to be paid to any broker. There are no borrowings made for investment in shares. There is also a sizeable dividend of Rs.92,037/-.

8. After considering the aforementioned facts of the case as well as the detailed order passed by CIT(A) we have also noticed that assessee has traded in about 33 different scrips and it is observed that in the 33 scrips there was no repetitive transactions and there are no intra day trades nor short sales. As per the order of CIT(A) all the transactions are delivery based. The most important fact in the present case is that out of the total amount of ₹18,36,076/-, short term capital gains of Rs.17,21,540/- are for shares held for more than 300 days. The percentage of capital gains @ 93.29% is earned on the shares held for more than 100 but less than 365 days. 6.71% of capital gains is shown in respect of shares held for a period of less than 100 days in 13 transactions and less than 30 days in 23 transactions. The said details are found mentioned in the order passed by CIT(A). CIT(A) has rightly come to the conclusion that assessee does not have a running account with broker and no margin money is stated to be paid to any broker. It was also observed by the CIT(A) that there was no borrowing made for investment in shares. Therefore we do not find any error in the findings recorded by the CIT(A). We uphold the same.

9. In the result, appeal filed by Revenue is dismissed.

परिणामतः राजस्व की अपील खारिज की जाती है।

Order pronounced in the open court on 30th December, 2015.
आदेश की घोषणा खुले न्यायालय में दिनांक: 30.12.2015 को की गई।

Sd/-
(B.R. BASKARAN)
लेखा सदस्य/ ACCOUNTANT MEMBER

Sd/-
(SANDEEP GOSAIN)
न्यायिक सदस्य/ JUDICIAL MEMBER

मुंबई Mumbai, दिनांक Dated 30th December, 2015

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A) - 23, Mumbai
4. आयकर आयुक्त / The CIT - 12, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, "D" Bench ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ By Order

सत्यापित प्रति //True Copy//

सहायक पंजीकार /Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई/ITAT, Mumbai

n.p.