

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'SMC' BENCH, KOLKATA**

Before Shri P.M. Jagtap, Accountant Member

**I.T.A. No. 1400/KOL/ 2013
Assessment Year: 2005-2006**

Anjana Devi Agarwal,.....Appellant
Poddar Villa,
Ranchi Road,
Purulia,
West Bengal-723 102
[PAN : ACHPA 1318 A]

-Vs.-

Assistant Commissioner of Income Tax,.....Respondent
Circle-3, Asansol

Appearances by:

Shri R.M. Jain, Advocate, for the assessee
Shri Tanuj Niyogi, JCIT, Sr. D.R., for the Department

Date of concluding the hearing : January 05, 2016
Date of pronouncing the order : February 10, 2016

O R D E R

This appeal is preferred by the assessee against the order of Id. Commissioner of Income Tax (Appeals), Asansol dated 18.03.2013 for the assessment year 2005-06 and the solitary issue arising out of the same for my consideration is whether the profit of Rs.11,54,913/- claimed to have been earned by the assessee from the sale of shares is chargeable to tax under the head "capital gains" or "profits and gains from the business or profession".

2. The assessee in the present case is an individual, who filed her return of income for the year under consideration on 19.07.2005 declaring total income of Rs.12,79,200/-. In the said return, profit from the sale of shares amounting to Rs.11,54,913/- was declared by the assessee as short-term capital gain liable to tax at a concessional rate of

10%. During the course of assessment proceedings, the relevant transactions giving rise to the said profit were examined by the Assessing Officer and on such examination, he found that a particular modus operandi was followed by the assessee, which resulted in unprecedented profit in the transactions of shares in connivance with some brokers. After discussing this modus operandi in detail in the assessment order and also after referring certain judicial pronouncements, the Assessing Officer held that the entire transactions giving rise to capital gains to the assessee were mere accommodation entries through which the unaccounted money of the assessee was converted into accounted money. He, therefore, held that the entire sale proceedings of the shares were chargeable to tax in the hands of the assessee under the head "income from other sources". Without prejudice to this conclusion drawn by him, the Assessing Officer also held that the relevant shares having been purchased by the assessee with the sole intention of selling the same for profit and not to hold the same to enjoy income thereon for sometimes, the profit arising from sale of such shares was chargeable to tax in the hands of the assessee as business income and not capital gains. In the assessment completed under section 143(3) vide an order dated 22.11.2007, the Assessing Officer, however, finally brought to tax the amount of profit of Rs.11,54,913/- arising on sale of shares in the hands of the assessee under the head "profits and gains of business or profession".

3. Against the order passed by the Assessing Officer under section 143(3), an appeal was preferred by the assessee before the Id. CIT(Appeals) and after considering the submissions made by the assessee as well the material available on record including the order of assessment, the Id. CIT(Appeals) held that the general modus operandi adopted by the assessee in respect of share transactions as explained by the Assessing Officer was only a supporting material. He, therefore, disregarded the same and focussed only on the core issue as to whether the income of the assessee from share transactions was chargeable to tax

in her hands as business income or short-term capital gains. In this regard, he recorded his findings/ observations as under:-

(i) There are no two views possible on the issue as sought to be contended on behalf of the assessee.

(ii) By mere meeting of conditions in section 111(1)(a) and (b), the income does not become capital gains and the decision whether the income is capital gains or not is to be made independently.

(iii) The relevant transactions of purchase and sale of shares in a Private Company were made by the assessee within a short period indicating clearly that it was adventure in the nature of trade.

(iv) The intention of the assessee behind purchase of shares was to sale the same for profit and not to retain for some periods in order to earn dividend.

4. On the basis of the above findings/ observations recorded by him, the Id. CIT(Appeals) held that the profit arising from the relevant transactions in shares was chargeable to tax in the hands of the assessee as business income and not short-term capital gains. Accordingly, the order of the Assessing Officer on this issue was upheld by him. Aggrieved by the order of the Id. CIT(Appeals), the assessee has preferred this appeal before the Tribunal.

5. I have heard the arguments of the sides and also perused the relevant material available on record. Although the Id. D.R. has strongly relied on the orders of the authorities below in support of the Revenue's case on the issue under consideration, it is observed that the various findings recorded by the Assessing Officer in the assessment order to come to the conclusion that the entire transactions of shares giving rise to the income of the assessee were accommodation entries, and therefore, the entire sale proceeds of shares were liable to be taxed in the hands of

the assessee under the head "income from other sources", were not finally relied upon by the Assessing Officer himself as only the net profit was brought to tax by him in the hands of the assessee in the assessment and that too under the head "profits and gains of business or profession". The Id. CIT(Appeals), therefore, disregarded these findings recorded by the Assessing Officer and decided the issue as to whether the profit from share transactions chargeable to tax in the hands of the assessee as business income or short-term capital gains, which according to him, was the core issue involved in the case of the assessee.

6. It is by now well-settled that the issue as to whether the profit arising from share transactions is chargeable to tax as business income or capital gains depends on the intention of the assessee behind purchase of shares and such intention is to be gathered from the conduct of the assessee as seen from the facts and circumstances involved in each case. There are certain guidelines laid down in this regard in the various judicial pronouncements and even CBDT has also issued Circulars outlining such guidelines. If these guidelines are applied to the facts on the present case as explained by the Id. Counsel for the assessee from the relevant material placed on record, I find myself in agreement with the Id. Counsel for the assessee that the relevant shares were purchased by the assessee as an investor and the profit arising from sale thereof, therefore, is chargeable to tax in the hands of the assessee as capital gain. First of all, there were only seven transactions in shares entered into by the assessee during the year under consideration, three of purchase of shares and four of sale of shares. The frequency of share transactions thus was very low and even the shares of total three Companies purchased by the assessee were held for a period of about three months. Moreover, all these three Companies were listed Companies and the transactions of purchase and sale of shares were made by the assessee on Stock Exchange through registered brokers. Besides these very limited share transactions, there were no other transactions entered into by the assessee in shares during the year under consideration. Even the share

transactions made by the assessee in the earlier years were limited and whatever profit or loss arising from such transactions was offered by the assessee to tax under the head "capital gains", which was accepted by the Department. A perusal of the relevant balance-sheet of the assessee also shows that the investment in shares was made by the assessee out of her own funds and the only source of income of the assessee for the year under consideration was interest from small savings as well as loan given to one Company. There is nothing in the relevant financial statements filed by the assessee for the year under consideration to indicate that any expenditure necessary to carry on any business activity was incurred by the assessee. Having regard to all these facts of the case, I am of the view that the relevant shares were purchased by the assessee as investor and the profit arising from sale thereof was chargeable to tax in her hands as short-term capital gains and not business income. In that view of the matter, I set aside the impugned order of the Id. CIT(Appeals) on this issue and direct the Assessing Officer to bring to tax the profit of the assessee from sale of shares in her hands as short term capital gain.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on February 10, 2016.

Sd/-

**(P.M. Jagtap)
Accountant Member**

Kolkata, the 10th day of February, 2016

- Copies to :*
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West Bengal-723 102**
 - (2) Assistant Commissioner of Income Tax,
Circle-3, Asansol**
 - (3) Commissioner of Income-tax (Appeals), Asansol**

- (4) Commissioner of Income Tax, Kolkata*
- (5) The Departmental Representative*
- (6) Guard File*

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.