

आयकर अपीलिय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री टी.आर.मीना, लेखा सदस्य एवं श्री ललित कुमार, न्यायिक सदस्य के समक्ष
BEFORE: SHRI T.R.MEENA, AM & SHRI LALIET KUMAR, JM

आयकर अपील सं./ITA Nos. 605/JP/2013
निर्धारण वर्ष / Assessment Years : 2008-09.

The DCIT, Circle-2, Jaipur.	बनाम Vs.	Shri Mahender Kumar Bader, Dhanraj Mahal, 3827, MSB Ka Rasta, Johari Bazar, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. ADJPB 4635 L		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से/ Revenue by: Smt. Neena Jeph (JCIT)
निर्धारिती की ओर से/ Assessee by by : Shri Rajeev Sogani &
Shri Rohan Sogani, (C.A.)

सुनवाई की तारीख / Date of Hearing : 11.02.2016.
घोषणा की तारीख / Date of Pronouncement : 18/03/2016.

आदेश / ORDER

PER SHRI LALIET KUMAR, J.M.

The present appeal filed by the revenue is arising from the order dated 18.03.2013 passed by the learned CIT (A)-I, Jaipur for the A.Y. 2008-09. The ground raised is as under :

“ Whether on the facts and in the circumstances of the case and in law the Id. CIT (A) was justified in treating income arising from sales of shares as income from short term capital gain ignoring the facts that there were substantial and frequent transactions and motive was to earn profit and holding period of such shares was very short.”

2. The brief facts of the case are that the assessee has filed the return of income on 29.09.2008 declaring total income of Rs. 85,86,760/-. The assessee derived income from business and income from other sources. The case was scrutinized under section 143(3). During the course of assessment proceedings, the AO observed that the assessee claimed investment activity and shown short term capital gain from share transaction of Rs 73,70,214/-. Examination of D-mat accounts and transactions in brokers' account furnished by the assessee makes it clear that purchase and sale of shares/units is not investment activity but it is the business of the assessee. During the course of the proceedings, the assessee was asked to submit an analysis of the entire port folio taking into consideration various parameters such as number of scrips, volume, frequency of transactions and their systematic and period nature. The details regarding the inherent nature of the port folio were duly analyzed in the light of CBDT Circular No 4 of 2007 dated 15.06.2007, decision of Apex Court in the case of CIT vs. Associated Industrial Development Company Pvt. Ltd. etc. The AO discussed the activity of the assessee as under :

3. The details submitted by the assessee along with return of income and during the course of assessment proceedings, D-mat account of assessee and transactions in D-mat account of broker reveals that assessee has done voluminous transactions in shares & units. The transactions are frequent and amount involved is very large. The assessee has done many transactions of purchase & sale during the year. The volume of transactions can be ascertained from the details of shares transaction entered into by the assessee. On careful analysis of the entire portfolio and resultant purchase and

sale of scrips, the AO observed that the transactions entered into by the assessee are numerous periodic, repetitive with great amount of regularity & periodically. The AO also observed that there has been a systematic and regular trading pattern and shares have been purchased and sold at very regular intervals. This feature is seen in respect of buying of shares of a single company or in respect of buying and selling of shares of many a company for a very short holding period of a few days and few months. It is well settled that whenever an activity is periodic, systematic and regular with a clear profit motive it can certainly assume the character of a business activity. During the assessment proceedings, the assessee explained that he is investing with intention to keep invested in shares for the purposes of earning income from capital gains and dividend thereon. The AO found the explanation of the assessee unacceptable seeing the details furnished by the assessee as hardly one can earn any dividend with such short period of holdings. The AO noticed that the average holding period in many scrips ranges from merely few day to few months. From the details furnished it is clear that out of total no. of shares, most of transactions held is for less than 5 months, many of the shares have been sold within few days of purchase. On being asked to justify his claim of income from shares as short term capital gain, rather than business income, the Id. A/R replied as under :-

“ As submitted earlier that the short term capital gain shown is on shares held by the assessee as investment. Assessee has been investing in shares from last several years and has been declaring Capital Gain on the same. All shares are on delivery basis. Even in the earlier years the assessee shown shares as his investment and declare capital gain if any arising at the time of sale which has been accepted and assessed as such. Assessee has never done share transaction with the intention of business.

As is evident that the number of scripts in which assessee has invested are very less and the same has been done with the motive of investment and the assessee has regularly declared the same as his share investment. We are enclosing the copy of returns and computation showing the capital gain declared by the assessee in earlier years. Even CBDT in circular no. 4/2007 dated 15.06.2007 have clearly laid down the guidelines as to whether a share transaction is for purpose of investment of business and the assessee fulfills as criteria of the said circular.”

The AO considered the explanation of the assessee but could not find it non-tenable. Intention of the assessee was not investment which is already discussed supra. Mere delivery of shares does not decide the nature of transactions. It has the holding period; frequency of transaction and other criteria laid down determines nature of transactions. Mere fact that assessee has taken delivery, at most, puts the nature of business as non-speculative business income. The AO observed that the assessee himself has claimed that on the basis of shares, allegedly closing stock of the assessee lying with broker, he is allowed to purchase & sale of shares on credit. Such nature of transaction merely fortifies the fact that assessee is engaged in business of transaction of shares not as an investment. Further, assessee as referred to the circular of CBDT wherein only this is clarified that assessee can have investment and business portfolio of shares simultaneously. However, whether alleged investment activity is actually investment or business activity shall be examined in the light of case laws & circulars discussed supra. Assessee has taken the plea that he has shown activity as investment in previous balance sheets. The AO placing reliance on the various judicial precedents held that entries in the books of account alone are not conclusive proof to decide the real nature of transactions and also one cannot rely on mere book entries to arrive at a proper

conclusion as to the real nature of the income. The AO observed that the activity so carried out by the assessee clearly substantiate that the assessee has been indulged in the activities of business or profession by virtue of trading in shares, mutual funds, debentures etc.; thus during the year under consideration income from shares is held as business activity of the assessee.

3.1. In view of the facts & circumstances of mentioned above, the AO held that it is clearly established that assessee's motive was not investment but it was a business activity in shares. The quantum of purchases and sale of shares was very high during the year. There are repetitions of the transactions period of holding of shares is very less even most shares has been transacted within few days. Thus the AO treated the profit of Rs. 73,70,214/- as income from business instead of income declared by the assessee as a short term capital gain, and added the same to the total income of the assessee.

4. Being aggrieved by the order of AO, the assessee carried the matter before Id. CIT (A) who after discussing the matter at length, allowed the ground of the assessee by observing as under :-

" I have considered the facts of the case and the submissions made. The submission of the appellant is acceptable. The addition has been made by the AO in a routine and perfunctory manner without bringing on record any material to justify the addition made. It is stated that in the A.Y. 2007-08 the short term capital gain of Rs. 2,83,209/- declared by the assessee under similar circumstances was not disturbed by the department. The decision quoted by the A/R for the appellant in the case of Nagindas P Sheth (HUF) vs. ACIT-21 (3) Mumbai ITA No.

961/MUM/210 A.Y. 2006-07 is clearly applicable wherein it was held that “*The assessee is an investor. Such being the case, merely because assessee transacted in 158 shares that should not be taken as a sold criterion to come to the conclusion that assessee is a trader in shares. It is not in dispute that in the books of accounts assessee has declared the shares as investment and the finding of the learned CIT (A) that only own funds were utilized for purchase of shares was not contradicted by the learned DR. It was also highlighted by the learned CIT (A) that assessee had not indulged in any squaring-up of the transactions on the same day. On a conspectus of the matter, we are of the view that the transactions of purchase and sale of shares, in the instant case, deserves to be considered as investment and profit thereon has to be assessed to tax under the head "capital gains".* Hence, in view of these facts and judicial decision referred by the A.R for the appellant it is held that it is not in dispute that in the books of accounts has declared the shares as investment and the findings of the AO that only own funds were utilized for purchase of shares was not contradicted by the AO,. Hence, the transaction of purchase and sale of shares in the instant case, deserves to be considered as investment and profit thereon has to be assessed to tax under the head “capital gains”. The appellant succeeds on this ground.”

5. Now the revenue is before us.

5.1 We have heard the rival contention of the parties and have also perused the record. The Id. D/R for the revenue has submitted that the income earned by the assessee on account of sale and purchase of shares is required to be treated as business income and not required to be treated as short term capital gain. He relied

upon the order passed by the AO and prayed that the order of Id. CIT (A) is required to be set aside.

5.2. On the contrary, the Id. A/R for the assessee has submitted that the assessee has consistently declared the gains/losses under the head Capital Gains, even if the same was disadvantageous to the assessee. The Id. CIT (A) has mentioned the same in the order as under :-

“ Yet another important fact having bearing on the issue under appeal is that the assessee continued to declare the gains/losses under the head Capital Gains. In the A.Y. 2010-11 the assessee lost the benefit of set off of Long Term Capital Loss amounting to Rs. 27,94,426/- because he had declared the said loss under the head capital gain and not under the head Income from Business and Profession. Copy of Computation of Total Income for A.Y. 2010-11 is enclosed herewith for your reference. Here, it is to be noted that, if the assessee had really carried on the share trading business, he could have claimed the loss from shares under the head Business and Profession and accordingly would have reduced the tax liability by setting off the same from income of jewellery business. This consistent approach, even to the assessee's disadvantage, substantiates the investment in shares, being of capital assets.”

It was further submitted that the assessee has declared the short term capital gain of Rs. 2,83,209/- in the A.Y. 2007-08. The Id. CIT (A) has not disturbed the finding while passing the order under section 143(2) of the IT Act. The Id. A/R further relied upon the following judgments in support of his contention :

CIT vs. Karamchand Thapar & Sons Ltd.
115 ITR 250 (Cal.)

Trupti Investment Co. vs. ITO
35 ITD 200 (ITAT Ahmedabad)

CIT vs. Sugar Dealers
100 ITR 424 (All.)

CIT vs. Guest Keen & Neettlefold Ltd.
115 ITR 205 (Cal.)

CIT vs. Manna Lal Nirmal Kumar Surana
264 ITR 116 (Raj.)

CIT vs. Simpson General Finance Co. Ltd.
230 ITR 222 (Mad.)

ACIT vs. Khetan Kumar A Shah,
242 ITR 83 (Kerala)

Ashoka Viniyoga Ltd. vs. CIT
70 ITR 381

5.3. Before us the moot question which is required to be decided is whether the income earned by the assessee on account of share is required to be treated as business income or required to be treated as short term capital gain. After the matter was heard on 11.02.2016, the CBDT came out with the Circular No. 6/2016 dated 29.02.2016 in the following manner :-

"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."

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 (i.e. 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 to such transactions in shares/securities where the genuineness of the transaction is itself questionable such as bogus claims of long term capital/short term capital loss or any other sham transactions.

5. It is reiterated that the above principles have been formulated with the sole object of reducing the 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."

In view of the circular, we have clearly noticed that the issue raised in this appeal stands fully covered by the Circular issued by the CBDT. Since the assessee has treated the securities as investment and not as stock in trade in all the years, therefore, in view of the CBDT Circular, the revenue is not permitted to take a contrary view in the present year and claimed that the security is stock in trade and, therefore, the profit/gain caused to the assessee be treated as business income. In our view, there is no merit in the contention of the revenue and it deserves to be dismissed in view of the circular. We, therefore, confirm the impugned order of Id. CIT (A) in this regard and dismiss the ground raised in this appeal.

6. In the result, appeal of the revenue stands dismissed.

Order pronounced in the open court on 18/03/2016.

Sd/-
(टी.आर.मीना)
(T.R. Meena)

लेखा सदस्य / Accountant Member

Sd/-
(ललित कुमार)
(Laliet Kumar)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 18/03/2016.

Das/

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

1. अपीलार्थी / The Appellant-The DCIT, Circle-2, Jaipur.
2. प्रत्यर्थी / The Respondent-Shri Mahender Kumar Bader, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 605/JP/2013)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar