

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.2242 OF 2013

Pine Tree Finserve Pvt.Ltd.
Mumbai 400 021

... Appellant

v/s

The Commissioner of Income Tax-3,
Mumbai 400 020 and anr.

... Respondents

Mr P.J. Pardiwalla, Sr. Counsel with Ms Aasifa Khan for
Appellant.

Mr A.R. Malhotra with Mr N.A. Kazi for Respondents.

**CORAM: M.S. SANKLECHA AND
B.P. COLABAWALLA JJ.**

DATE : 22nd FEBRUARY, 2016

P.C.:-

1. This Appeal filed under section 260A of the Income Tax Act 1961 (the Act) takes exception to the order dated 30th August 2013 passed by the Income Tax Appellate Tribunal (Tribunal). The impugned order relates to AY 2008-09.

2. Mr Pardiwalla, learned Sr. Counsel for the Appellant urges only the following question of law for our consideration :-

“ Whether, on the facts and in the circumstances of the case and in law, was the Tribunal justified in rejecting the submissions of the appellant that it had earned the short term capital gain of Rs.77,85,745/- by considering the same as the nature of business income ?”

3. The Appellant - Assessee is engaged in the business of trading of shares and providing equity share advise. During AY 2008-09, the Appellant filed its return of income declaring profit in trading of shares at Rs.7.75 lakhs and short term capital gain at Rs.77.85 lakhs. This distinction between capital gains on account of investment and gains on trading account in respect of shares in same companies was made on the basis that wherever the holding of shares was in excess of one day, it fell for classification as capital gains on account of investment. The Assessing Officer, in his order dated 15th November 2010 held that the amount shown as short term capital gains on shares is in fact profit earned in the business trading activity in shares carried out by the Appellant. Therefore, the Appellant - Assessee brought the amount of Rs.77,85 lakhs to tax as income from business or profession.

4. In Appeal, by order dated 29th September 2011, the

Commissioner of Income Tax (Appeals) (CIT(A)) dismissed the Appellant's Appeal upholding the Assessing Officer's order. This by holding as under :-

“4. I have considered the facts of the case and submissions of the assessee. It is a matter of fact whether a person is dealing in shares as trader or as investor. For this purpose all the relevant facts have to be considered. The relevant facts in such cases are the nature to purchase, entry in books of account, frequency of transactions, period of holding volume of transactions, nature of funds, whether borrowed or own capital, other activities of the assessee etc. In the case of the assessee motive is claimed to be investment but it is not reflected by any other evidence except claiming that in books of account such holding of shares has been classified as investment and assessee has also claimed that it has not used the borrowed funds. These two factors appear to be in favour of the assessee whereas A.O. has analyzed the other parameters also, as per the details and Tables given in the assessment order, from which it is seen that assessee is holding shares from one day to maximum 75 days and no transaction is for a longer period. Most of the holdings are for less than two months. At the same time, the volume of transactions is also high which is in many cases 50,000 shares or more, which shows that assessee does not intend to hold them as investment. In share trading A/c. assessee has not shown anything held for more than one day. Therefore, from the facts and circumstances of the case it clearly appears that assessee is trading in shares but the shares where the holding period is less than one day are shown on account of trading except two transactions and all other transactions despite high volume and holding for less than 75 days have been shown as investment. But it is merely to claim the benefit under taxation.

Therefore, the action of the A.O. is upheld and the ground of appeal of the assessee is rejected. ”

5. Being aggrieved, the Appellant carried the issue in appeal to the Tribunal. The Tribunal, by the impugned order dated 30th August 2013, after considering the Circular No.4 of 2007 dated 15th June 2007 issued by the Central Board of Direct Taxes, observed that there are various factors such as frequency, volume, entry in the books of accounts, nature of funds used, holding period etc. which are relevant in deciding the true nature of transactions and no single factor is conclusive. Thus, mere non-introduction of interest bearing funds will not alone determine the nature of the transactions. The impugned order, after analyzing the statement of capital gains which were available before it, came to the conclusion that most of the shares have been sold within 30 days of its purchase and upheld the order of the CIT(A). Thus, concluding that the activity of purchase and sale of shares claimed to be on account of investment was in fact profit from its activity of trading in shares to the extent of Rs.77.85 lakhs.

6. Mr Pardiwalla, Sr. Counsel in support of the Appeal,

submits that an Assessee is entitled to hold shares, both on investment account as well as on trading account. In the present facts, the Assessee has offered profit earned on account of trading activities at Rs.7.75 lakhs and the amount of Rs.77.85 lakhs was also offered to tax as short term capital gains as they were gains made in respect of shares held as investment. It is further submitted that the finding of Tribunal that most of the shares have been held for less than 30 days from the date of purchase was not correct. Therefore, it is submitted that this appeal be admitted.

7. We find that all the authorities under the Act have on consideration of facts and in particular the statement of short term capital gain which was annexed to the return of income by the Appellant and also annexed as Exh.A-1 to the Appeal Memo rendered a finding of fact that the profit claimed to be on account of purchase and sale of investment in shares was in fact on account of trading in shares. This conclusion was recorded after taking into account all factors laid down in the Circular No.4 of 2007 issued by the CBDT. We also find from the statement of short term capital gains annexed to the Memo of

Appeal that in a large number of cases, the holding of shares is for a short period i.e. less than 30 days and in any event not more than 75 days in any case as noted in the CIT(A) in his order.

8. In view of the above, we see no reason to interfere with the above concurrent findings of fact which has not been shown to perverse or arbitrary so as to give rise to any substantial question of law.

9. Therefore, the questions as formulated do not give rise to any substantial question of law. Accordingly, Appeal is dismissed. No order as to costs.

(B.P.COLABAWALLA, J.)

(M.S. SANKLECHA, J.)