

R.M. AMBERKAR
(Private Secretary)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

INCOME TAX APPEAL (IT) NO. 226 OF 2016

The Pr. Commissioner of Income Tax
(Central) .. Appellant

Versus

Adar Cyrus Poonawalla .. Respondent

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- Mr. Tejveer Singh for the Appellant
 - Mr. Percy Pardiwalla, Senior Counsel a/w Mr. Atul Jasani for the Respondent
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**CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.**

DATE : NOVEMBER 19, 2018.

P.C.:

1. This appeal is filed by the Revenue to challenge an Order dated 30.1.2015 passed by the Income Tax Appellate Tribunal, Pune Bench "B", Pune. Following questions are presented for our consideration:

- Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in law, by holding that the profit on sale of shares of M/s. City Parks Pvt Ltd as capital gain when there was a clear cut adventure in the nature of trade on the part of the assessee?
- Whether on the facts and circumstances of the case and in law, without prejudice to the above ground, the Hon'ble ITAT was justified in holding that the capital gain on account of sale of shares

of M/s. City Parks Pvt Ltd is long term capital gain when the underlying asset which got transferred due to sale of shares was 'Land and holding period of which was less than 36 months?

iii. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in not upholding the finding of the AO that transaction of sale of shares of HCL Technologies Ltd reflect active involvement of the assessee as a 'trader', rather than as an investor i.e transaction in the shares of HCL Technologies Ltd is a business transaction?

iv. Whether on the facts and circumstances of the case and in law, without prejudice to the above ground, the Hon'ble ITAT was justified in not upholding the stand of the Assessing Officer that the motive for carrying out the aforesaid set of transaction in the shares of HCL Technologies Ltd., was to incur loss on account of bonus stripping and then set off such loss against the long term capital gain accruing to the assessee on sale of shares of City Park Pvt Ltd with a motive to evade tax?

Learned counsel for the Revenue mainly concentrated on Questions (i) and (iii) for our consideration.

2. Brief facts are as follows:-

2.1 The respondent - assess is an individual. For the assessment year 2007-08, the assess had filed return of income tax which was taken in scrutiny by the Assessing Officer. During the such scrutiny assessment, the Assessing Officer noticed two transactions:- the first one was the sale of

shares by the assessee of one City Park Pvt Ltd. The said company had allotted 6,66,333 shares to Shri. Cyrus S. Poonawalla (assessee's father) on 27.1.2006 on par @ Rs. 10/- per share. Remaining 667 shares were allotted to him on 9.6.2006. All these 6,67,000 shares were received by the assessee as a gift from his father on 1.9.2006. The assessee sold the said shares during the period relevant to the assessment year under consideration.

2.2 During the same period, the assessee had entered into another transaction namely purchasing and sale of HCL Technologies Ltd. Between 28.2.2007 to 13.3.2007, the assessee purchased 4,71,517 shares of the said company for a total consideration (inclusive of brokerage) of Rs. 29.36 Crores (rounded off). On 12.2.2007, HCL Technologies announced bonus issue of shares in the ratio of one share for every one share held and the record date was fixed as 16.3.2007. The assessee, accordingly, received equal number of bonus shares. Later on, between 15.3.2007 to 28.3.2007, the assessee sold 4,71,517 shares of HCL Technologies for a consideration of Rs. 14.28 Crores (rounded

off). This resulted into a loss of Rs. 15.01 Crores (rounded off) which the assessee claimed as short term capital loss.

2.3. The assessee claimed to set off the capital gain earned in the process of sale of shares of City Part Pvt Ltd against the capital loss suffered by him in the process of sale of the shares of HCL Technologies. The Revenue objected to this claim of the assessee mainly on the ground that both the transactions were in the nature of assessee's business transactions. The objection of the Revenue was that the assessee had entered into the transactions of purchase and sale of shares of HCL Technologies in order to avoid tax liability. Revenue contends that the decision of the Supreme Court in the case of **Commissioner of Income Tax Vs. Walfort Shares & Stock Brokers (P) Ltd** reported in **(2010) 326 ITR 1 (SC)** would not apply. The Assessing Officer having passed an order of assessment accordingly, the issue reached the Tribunal against the judgment of CIT (Appeals). The CIT (Appeals) had held that the first of the transaction of the assessee i.e sale of shares of City Parks Pvt Ltd was not a business transaction, however, he ruled to the

contrary in respect of the transaction in the case of HCL Technologies. The Tribunal rejected the Revenue's appeal and allowed the assessee's appeal essentially holding that neither of the two sets of transactions were in the nature of business venture. According to the Tribunal, the assessee was not in the business of buying and selling shares and therefore, the assessee's claim for set off or loss against the gain was permissible. It is against this order that the Revenue has filed the present Income Tax Appeal.

3. We have heard learned counsel for the parties at considerable length and with their assistance perused the documents on record. With respect to the transaction in the case of City Parks Pvt Ltd, the Tribunal noted that the assessee had not acquired the shares through his own volition. That such shares were held previously by his father and were gifted to the assessee. The father had also held the shares as investment. The Tribunal also noted that City Parks Pvt Ltd was an unlisted Pvt Ltd Company and therefore, its shares were not freely marketable or tradable. The Tribunal was of the opinion that the Revenue failed to bring

on record any material to show that the assessee was actively trading in shares.

4. With respect to the assessee's transaction of purchase and sale of HCL Technologies, the Tribunal referred to the decision of the Supreme Court in the case of Walfort Share & Stock Brokers (P) Ltd (supra) and also took into consideration the legislative changes in Section 94 of the Income Tax Act which were discussed in the said judgment and held that the transaction in question was not hit by the said provision.

5. With respect to the Revenue's contention that the transaction was in the nature of business, the Tribunal rejected the same inter alia observing that whether a particular transaction is an adventure in the nature of trade or is an investment simplicitor is a mixed question of law and facts, however, a common thread is that no single test is conclusive and overall view has to be taken looking to the facts and circumstances of each case. With respect to the case in hand, the Tribunal noted that in the scrutiny assessment for the preceding as well as succeeding

assessment years, the profit on sale of shares earned by the assessee has been accepted by the Revenue as capital gain. Even with respect of the gain on sale of bonus shares of HCL Technologies, in the subsequent years, the Revenue accepted the same as capital gain. The Tribunal also noted that there was no material on record to suggest that the assessee has set up any organized structure or infrastructure for his business of trading in shares. The assessee was otherwise full time engaged in other gainful activities.

6. In our opinion, the entire issue hinges on the question whether the transactions in question were in the nature of business transactions or holding of shares by the assessee was purely in the nature of investment. Surely, the Revenue cannot object to legitimate tax planning. Legitimately, if the assessee had claimed set off of loss against the gain in sale of shares, the Revenue cannot frown upon the same simply by pointing out that in the process, the assessee reduced his tax liability. The Tribunal has examined both the transactions extensively. With respect to the first transaction of sale of shares in City Parks Pvt Ltd., the Tribunal noted that the

shares were gifted by his father who himself had held the shares as investment. The company was unlisted Pvt Ltd Company. There was no material on record to suggest that the assessee had entered into the business venture in the process. Likewise in the second transaction also, the Tribunal noted that the Revenue has, in the preceding and succeeding assessment years, accepted, the sale of shares by the assessee as investment and the proceed was treated as capital gain. With respect to HCL Technologies, when the assessee sold the bonus shares in the later year, the Revenue treated the gain as capital gain. We are broadly in agreement with the view of the Tribunal. There is no material to hold that the assessee was in the business of buying and selling shares. In our opinion, no question of loss, therefore, arises. The Income Tax Appeal is dismissed.

[M.S. SANKLECHA, J.]

[AKIL KURESHI, J]