

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 1763 of 2005

With

TAX APPEAL NO. 1764 of 2005

TO

TAX APPEAL NO. 1767 of 2005

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

DEEPABEN AMITBHAI SHAH....Appellant(s)

Versus

DY.COMMISSIONER OF INCOME TAX....Opponent(s)

Appearance:

MR MANISH J SHAH, ADVOCATE for the Appellant(s) No. 1

MR JP SHAH, ADVOCATE for the Appellant(s) No. 1

MR.VARUN K.PATEL, ADVOCATE for the Opponent(s) No. 1

CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 08/06/2016

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

All these appeals arise out of the common order dated 25.7.2005 passed by the Income-tax Appellate Tribunal, Ahmedabad (hereinafter referred to as “the Tribunal”) whereby the Tribunal has reversed the findings of the Commissioner of Income-tax (Appeals) by restoring the order of the Assessing Officer. While admitting the appeals, this court framed the following substantial question of law:

“Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee lady was a dealer in shares and was not an investor in shares?”

2. The facts of the case are that the appellant-assessee has, for the assessment years 1992-93, 1993-94, 1994-95, 1995-96 and 1996-97, done transactions in shares as a small investor. During that time, the assessee has earned profit by way of short term capital gains and long term capital gains.

3. Learned advocate Mr. Shah appearing for the appellant-assessee has taken us through the judgement of the Commissioner of Income-tax (Appeals) and contended that

the Commissioner of Income-tax (Appeals) has discussed the issue in detail and in paragraph No. 9 of the judgement, he has observed as under:

“On consideration of the full facts of the case, the impression that one gathers is that the appellant having substantial funds of about Rs. 57 lakh at her disposal, in the climate where investment in shares was considered as the most sound and rewarding investment, went in for purchase of large volumes of shares involving substantial funds. The fact that she purchased from open market, also she mostly went in for transfer of the shares in her name is an indicator that she had intention of making investments in shares. The mode of purchase adopted by the assessee is not that of a trader in as much as a trader would not undergo the cumbersome procedure of applying for allotment of shares through share applications and wait for their allotment which may take two to three months. Also a trader would not block his or her funds for such a long period from the date of application to the date of allotment and actual receipt of share certificates from the companies. Similarly, a trader, who buys shares from the secondary market through share brokers with the intention of selling them quickly for earning profit, would not send the shares to the companies for registration/transfer in his or her name. This again involved considerable time in getting the shares transferred to one’s name and also expenditure in payment of stamp duty on such transfer. The facts, therefore, are appointed to an inference that the appellant had intended to invest her funds in shares.

However, the other limb of the matter is that the appellant has also quickly sold the shares sometimes within short intervals of less than 12 months. This fact would not, however, ipso facto, lead to the conclusion that the appellant was a trader in shares inasmuch as when the share market was having a steep upward trend, even an investor would be inclined to sell off the shares for getting maximum return for its investment. However, those shares which she purchased and sold, without getting them registered in her name, are clearly outside the purview of investment. Applying the test of dominant impression that one gets, looking at the nature of transactions, I am of the view that the appellant held most of the shares as her investment and not as stock in trade. Also, the facts show that the large magnitude of transactions was on account of large funds available with the appellant for investment. On the facts and circumstances of the case, the conclusion that she was a trader in shares is not warranted. However, the profits earned from sale of such shares, which were not registered/transferred in the name of the appellant, irrespective of whether held for more than 12 months or less than 12 months, should justifiably be assessed as business profits and not capital gains. The profit earned by her on sale of shares registered in her name is, therefore, required to be taxed as capital gains, long term or short term, depending upon the period of holding. In respect of the remaining, it should be treated as business income. The Assessing Officer is, therefore, directed to verify the requisite facts and recompute her income on the

basis spelt out above.”

4. The learned counsel for the appellant has further contended that the Tribunal while setting aside the judgement of the Commissioner of Income-tax (Appeals) has not properly considered the decision of this court relied on by the appellant in the case of **Dy. C.I.T. v. Smt. Divyaben C. Shah** delivered on 18.4.2001 in Tax Appeal No. 104 of 2001 with Tax Appeal No. 105 of 2001 which reads as under:

“Admittedly as per return short term capital gain was Rs. 4,31,938/- and Rs. 5,73,738/- as against the long term capital gain at Rs. 7,84,422/- and Rs. 6,86,333/for Assessment Year 1993-94 and 1994-95 respectively, which is clear from the record. It is also clear that the shares were not shown as stock-in-trade and there was no finding recorded that there was any conversion. The Tribunal after considering various judgments as also keeping in mind the finding recorded by the Commissioner of Income Tax, Appeals, arrived at a conclusion. In para 25, the Tribunal has pointed out the test to be considered as laid down in case of P.M. Moahmmed Meers Khan vs. CIT [73 ITR 735] and in the case of Khan Bahadur Ahmed Alladin & Sons vs. CIT [68 ITR 573]. The Tribunal after applying the test pointed out as under.

(i) The assessee have purchased almost all the scripts from primary market. (ii) The purchases during the year under consideration from the secondary market were quite insignificant. (iii) The investments have been mostly made out of their own funds and not out

of borrowed funds. (iv) The shares have been acquired by way of subscription to the public issue. (v) The shares have been held for fairly long period. (vi) The shares once sold have never been repurchased. (vii) In the immediately preceding years, the shares shown have been accepted as investments. (viii) The purchase of shares was with an intention of keeping them as investment. (ix) The shares were never held as stock-in-trade. (x) Shares purchased were never subdivided into group with an intention to sell."

Keeping these aspects in mind and considering other decisions, the Tribunal arrived at a conclusion that the assessee never indulged in adventure of any trade.

We find no substantial question of law arising in these appeals. The appeals are therefore dismissed."

5. The learned counsel for the appellant has relied on a decision of this court in the case of **Commissioner of Income-tax v. Brijesh Bhagwatilal Lavti** reported in (2013) 38 Taxmann.com 376 (Gujarat) wherein it was held as follows:

"Where assessee, a salaried class person, earned profit amounting to Rs. 70 lakhs on sale of shares, Tribunal was right in holding assessee as investor and treating gain as capital gain as against business income treated by Assessing Officer."

6. Similar view is taken in the case of **Commissioner of Income-tax v. Saurabh Rameshchandra Lavti**

reported in (2013) 40 Taxmann.com 214 (Gujarat) and **Commissioner of Income-tax v. Manish Nathulal Lavti** reported in (2013) 36 Taxmann. Com 5 (Gujarat).

7. The learned counsel for the appellant has relied on the decision of this court delivered on 19.8.2013 in Tax Appeal No. 71 of 2013, more particularly, paragraph No. 3, wherein it has been observed as under:

“para – 3when in the immediate earlier year i.e. assessment year 2004-05 and with respect to the very shares, the Assessing Officer had accepted the same as investments in shares and when these very shares came to be sold by the assessee during the year under consideration, no error and/or illegality has been committed by the CIT(A) as well as Income-tax Appellate Tribunal in deleting the additions made by the Assessing Officer and treating it as business income for the purpose of short term capital gain and long term capital gain.”

8. Reliance is placed on the decision of the Supreme Court in the case of **Janki Ram Bahadur Ram v. Commissioner of Income-tax, Calcutta** reported in (1965) 57 ITR 21 (SC) wherein it has been held by the Supreme Court as under:

“Held, on the facts, that the purchase and sale of the property was not an adventure in the nature of trade within the meaning of section 2(4) and the profit realised therefrom was not taxable under section 10 of the Indian Income-tax Act, 1922. The facts that the

appellant made a profitable bargain when it purchased the property and that it had a desire to sell the property if a favourable offer was forthcoming could not without other circumstances justify an inference that the appellant included by purchasing the property to start a venture in the nature of trade.

It is for the revenue to establish that the profit earned in a transaction is within the taxing provision and is on that account liable to be taxed as income. The nature of the transaction must be determined on a consideration of all the facts and circumstances which are brought on the record of the income-tax authorities.

The question whether profit in a transaction has arisen out of an adventure in the nature of trade is a mixed question of law and fact.

If a transaction is related to the business which is normally carried on by the assessee, though not directly part of it, an intention to launch upon an adventure in the nature of trade may readily be inferred. A similar inference would arise where a commodity is purchased and sub-divided, altered, treated, or repaired and sold, or is converted into a different commodity and sold. Magnitude of the transaction of purchase, the nature of the commodity, subsequent dealings and the manner of disposal may be such that the transaction of purchase of land cannot be assumed without more to be a venture in the nature of trade.

The profit motive in entering a transaction is not decisive, for an accretion to capital does not become

taxable income merely because an asset was acquired in the expectation that it may be sold at a profit.”

9. In light of the above decisions, the learned counsel for the appellant submitted that the Tribunal has committed an error in reversing the judgement of the Commissioner of Income-tax (Appeals) and confirming the order of the Assessing Officer holding that the income arisen to the assessee out of shares was assessable under the head ‘profit and gains of business or profession’ and not as capital gains. He has further submitted that now the Government has come out with subsequent Circular No. 6 of 2016 dated 29.2.2016 which will govern the field. The said Circular reads as under:

“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.

2. 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 tax payers 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 in respect of such transactions in shares/securities where the genuineness of the transaction itself is questionable, such as bogus claims of Long Term Capital Gain/Short Term Capital loss or any other sham transactions.

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

10. Learned counsel for the respondent Mr. Varun Patel has supported the order of the Tribunal and contended that the Tribunal has rightly reversed the order of the Commissioner of Income-tax (Appeal) and restored the order of the Assessing Officer holding that the income arisen to the assessee out of sale of shares was assessable under the head `profit and gains

of business or profession'. He has relied on the decisions of the Supreme Court in the cases of **Commissioner of Income-tax (Central), Calcutta v. Associated Industrial Development Co. (P) Ltd.** reported in 82 ITR 586, **Raja Bahadur Visheshwara Singh v. Commissioner of Income-tax** reported in (1961) 41 ITR 685 and **Commissioner of Income-tax v. Sulej Cotton Mills Supply Agency Ltd.** reported in 100 ITR 706 and submitted that a single transaction or the manner in which the transaction is done is to be looked into and this is a pure question of law. Therefore, this court should not interfere with the order of the Tribunal.

11. We have heard learned advocate Mr. Shah for the appellant and learned counsel Mr. Patel for the respondent. Taking into consideration the question of law, we have considered that while the Assessing Officer has considered the income arisen to the assessee out of sale of shares as assessable under profit and gains of business or profession, however, in appeal, the Commissioner of Income-tax (Appeals), for the detailed reasons given in paragraph No. 9 as reproduced hereinabove, treated the income as short term capital gain/long term capital gain. Considering the decision of this court in the case of **Smt. Divyaben C. Shah** (supra) where this court has observed the test to be considered that “(i) The assessee have purchased almost all the scripts from primary market. (ii) The purchases during the year under consideration from the secondary market were quite insignificant. (iii) The investments have been mostly made out of their own funds and not out of borrowed funds. (iv) The shares have been acquired by way of subscription to the public issue. (v) The shares have been held for fairly long period. (vi)

The shares once sold have never been repurchased. (vii) In the immediately preceding years, the shares shown have been accepted as investments. (viii) The purchase of shares was with an intention of keeping them as investment. (ix) The shares were never held as stock-in-trade. (x) Shares purchased were never sub-divided into group with an intention to sell.", we are of the opinion that the assessee has made investment in shares as investor and therefore, the income arisen to the assessee out of sale of shares is assessable under the head capital gain and not profit and gains of business or profession. In that view of the matter, we set aside the order of the Tribunal.

12. In light of the above, we answer the question in favour of the appellant-assessee and against the revenue. Accordingly, all the appeals deserve to be allowed and are allowed.

(K.S.JHAVERI, J.)

(G.R.UDHWANI, J.)

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THE HIGH COURT
OF GUJARAT

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