

# **HIGH COURT OF JAMMU AND KASHMIR**

AT JAMMU

ITA No.129/2012

MP No.D-9/2013

And

ITA Nos.4/2014, 5/2013, 6/2013, 7/2013

Date of order: 02.02.2016

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## **ITA No.129/2012**

Commissioner of Income Tax,  
Railhead Complex, Jammu.

.....Appellant.

Versus

M/s SMAA Enterprises Pvt. Ltd.,  
Banglow B-1,  
Chenab Textile Mills Staff Colony,  
Kathua.

.....Respondent.

## **ITA No.4/2013**

Commissioner of Income Tax,  
Railhead Complex, Jammu.

.....Appellant.

Versus

M/s SMAA Enterprises Pvt. Ltd.,  
Banglow B-1,  
Chenab Textile Mills Staff Colony,  
Kathua.

.....Respondent.

## **ITA No.5/2013**

Commissioner of Income Tax,  
Railhead Complex, Jammu.

.....Appellant.

Versus

M/s SMAA Enterprises Pvt. Ltd.,  
Banglow B-1,  
Chenab Textile Mills Staff Colony,  
Kathua.

.....Respondent.

## **ITA No.6/2013**

Commissioner of Income Tax,  
Railhead Complex, Jammu.

.....Appellant.

Versus

M/s SMAA Enterprises Pvt. Ltd.,  
Banglow B-1,  
Chenab Textile Mills Staff Colony,  
Kathua.

.....Respondent.

**ITA No.7/2013**

Commissioner of Income Tax,  
Railhead Complex, Jammu.

.....Appellant.

Versus

M/s SMAA Enterprises Pvt. Ltd.,  
Banglow B-1,  
Chenab Textile Mills Staff Colony,  
Kathua.

.....Respondent.

**Coram:**

**Hon'ble Mr. Justice N. Paul Vasanthakumar, Chief Justice**  
**Hon'ble Mr. Justice Tashi Rabstan, Judge**

**Appearing counsel:**

For the Appellant(s) : Mrs. Aruna Thakur, Advocate.  
For the respondent(s) : M/s Rohit Jain & C.S.Azad, Advocates

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| i/  | Whether to be reported in Press/Media    | : | Yes |
| ii/ | Whether to be reported in Digest/Journal | : | Yes |

**N.Paul Vasanthakumar, CJ**

1. Heard Mrs. Aruna Thakur, learned counsel appearing for the M/s Rohit Jain and C.S.Azad, learned counsels appearing for the respondent.

2. These appeal are filed by the Revenue challenging orders of the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar, the Tribunal for short, made in ITA No.333(Asr)/2010 dated 11.04.2012, ITA Nos 317, 318, 319 and 320(Asr) of 2012 dated 27.09.2012 respectively.

3. In ITA No.129/2012 the Tribunal allowed the appeals preferred by the respondent, which were filed against the orders of Commissioner of Income Tax (Appeals), Bathinda

dated 18.05.2010 for the assessment year 2006-07. The contention of the respondent before the Tribunal was that the assessing authority as well as the appellate authority were not justified in treating the short term capital gain of Rs.1,80,75,100/- as income from business and levying the tax @30% instead of 10% on the ground that the assessee is engaged in the business of general trading in shares and doing investments only without any trading in shares. Respondent-Company was incorporated in 1996 and there was no separate assessment under Section 143(3) of the Income Tax Act for the assessment year 2001-02 to 2005-06. The assessing officer took up the matter for the assessment years 2004-05 & 2005-06 by issuing notice under Section 148 of the Income Tax Act. The assessment for the accounting years 2001-02, 2002-03 and 2003-04 were processed under Section 143(1) of the Act and no notice under Section 148 or 143(2) of the Act was ever issued. Therefore, the assessment for the assessment years 2001-02, 2002-03 & 2003-04 had attained finality where the assessee had declared the purchase and sale of the shares as an investment which has been accepted by the department. However, for the subsequent years the assessing officer treated the Company as a trading company and assessed the tax even though there

was no evidence on record that the assessee was doing trading in shares.

4. According to the respondent, the assessee does not have any office established as the traders do for running the business. The transaction has always been delivery based and for every transaction i.e. for purchases, the same transaction has been settled by taking the delivery and making payment and vice versa. The price has been paid and received in full. The assessee had received the substantial dividend unlike the trader. The assessee has filed two paper books i.e. first paper book in Vol. 1 containing 518 pages and another paper book containing pages 519 to 615 pages.

5. The Tribunal by applying the Circular No.4 of 2007 dated 15.06.2007 accepted the plea of the assessee and relying upon the judgment of Hon'ble the Supreme Court in **CIT v. Oswal Agro Mills Ltd. reported in 313 ITR 24** allowed the appeal by giving a factual finding that the assessee has declared purchases/holding of shares as investment for the past several years and surplus has been claimed as capital gains before the assessing authority and said facts are evident from the reply of the assessee dated 21.11.2008 and the appellate authority also has mentioned about the claim of the assessee with reference to purchases/holding of shares being shown as investment in past, valuation being done at cost and the

assessee has never treated such holdings in the past as stock in trade. It is also stated in the order that the claim of the revenue that assessee is doing stock in trade is without any basis and no material was brought on record to show that the assessee had been valuing the holding of shares as at the end of each year on FIFO method and the assessee had valued investment at cost and declared the same as investment as per the balance sheet as on 31.03.2006. It is also stated in the order that the shares have been held for more than 30 number of days which is evident from the holding period shown by the assessee in more than 92% of the transactions and the assessee retained the shares for appreciation in value and not with an intension of commercial motive. The assessee is not registered with any authority or body such as SEBI etc. to do trading in shares. The entire investment has been made out of owned funds and not out of borrowed funds and no contra material has been placed on record by the revenue to come to a different conclusion. Thus a factual finding has been given by the Tribunal stating that the department cannot change the stand in subsequent years without any changing material. The said factual finding having been recorded based on appreciation of documents, which were not considered by the assessing authority as well as the appellate authority, the contention of the revenue that the assessee is doing stock in

trade and not investments cannot be accepted and no substantial question of law arises for determination in these IT appeals.

6. Learned counsel appearing for the revenue forcefully argued that the factual findings recorded by the Tribunal are without any basis and same can be interefered based on no evidence. We are unable to appreciate the said contention as the Tribunal has recorded reasons and on perusing meticulously the materials placed before it and recorded the factual findings.

7. The judgment of Bombay High Court reported in **(2011) 336 ITR 287 (Bombay) titled Commissioner of Income Tax v. Gopal Purhit**) held that consistent practice of treating transactions in shares as investment, different view should not be taken for year under consideration. Learned counsel also submitted that the SLP filed against the said judgment was also dismissed by Hon'ble the Supreme Court. The Bombay High Court held that Revenue did not furnish any material to justify to adopt a divergent approach for the assessment under consideration, therefore, no substantial question of law arose for consideration and the appeal of the revenue was dismissed. The Delhi High Court in its decision dated 02.12.2009 made in **ITA No.1271/2009 titled CIT v. Jindal Photo Investment Ltd.** also dismissed similar appeal and held that share sold by the

assessee in the year under consideration has been held by the assessee for a considerable long time, which was shown as investment in the books of account and balance sheet for all these years and circumstances remained the same and had remained unchallenged by the department, it was erroneous to hold that the assessee kept the shares for trading purposes. The Delhi High Court dismissed the appeal on the ground that no question of law arises. In the decision reported in (2011) 333 ITR 445 (Delhi) CIT v. Jubilant Securities P. Ltd., the Delhi High Court again held the same view and in the decision reported in (2011) 334 ITR 192 (P&H) CIT v. Amit Modi, Punjab and Haryana High Court also held the same view.

8. In light of the said decisions of various High Courts and the factual facts having been properly appreciated by the Tribunal and no changing material having been furnished/placed by the revenue, we are unable to find any reason to entertain these appeals as no substantial question of law arises for consideration.

9. Consequently all these appeals are dismissed. No costs.

**(Tashi Rabstan)**  
**Judge**

**(N. Paul Vasanthakumar)**  
**Chief Justice**

**Jammu,**  
**02.02.2016**  
**Vinod.**